No. 90-1745-CFY
Status: GRANTED

Title: United States, Petitioner
v.
Richard Wilson

Docketed:
May 13, 1991

Court: United States Court of Appeals
for the Sixth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Martin,Henry A.

NOTE--90th day was Sun., 5/12.

Entry	Date	Note	Proceedings and Orders
1	May 13 1991	G	Petition for writ of certiorari filed.
2	Jun 17 1991		Brief of respondent Richard Wilson in opposition filed.
3	Jun 17 1991	G	Motion of respondent for leave to proceed in forma pauperis filed.
4	Jun 18 1991		DISTRIBUTED. September 30, 1991
5	Aug 27 1991	X	Reply brief of petitioner United States filed.
6	Oct 7 1991		Motion of respondent for leave to proceed in forma pauperis GRANTED.
7	Oct 7 1991		Petition GRANTED.
			**********
8	Oct 21 1991	G	Motion of respondent for appointment of counsel filed.
9	Nov 4 1991		Motion for appointment of counsel GRANTED and it is ordered that Henry A. Martin, Esquire, of Nashville, Tennessee, is appointed to serve as counsel for the respondent in this case.
15	Nov 18 1991	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
10	Nov 20 1991		SET FOR ARGUMENT WEDNESDAY, JANUARY 15, 1992. (2ND CASE)
11	Nov 21 1991		Brief of petitioner United States filed.
13	Nov 21 1991		Record filed.
		*	Certified record U.S.District Court, Middle District of Tennessee (2 SEALED ENVELOPES IN SAFE)
12	Nov 26 1991		Record filed.
		*	Partial proceedings and briefs United States Court of Appeals for the Sixth Circuit. (1 Volume)
14	Nov 27 1991		CIRCULATED.
16	Dec 9 1991		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
17	Dec 23 1991	X	Brief of respondent Richard Wilson filed.
18	Jan 8 1992	X	Reply brief of petitioner United States filed.
19	Jan 15 1992		ARGUED.

90-1745

No.

In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD WILSON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Section 3585(b) of Title 18 provides that a defendant shall be given credit toward the service of a term of imprisonment for any period he has spent in official detention before beginning his sentence. Credit is awarded if the detention is attributable to the offense of conviction or to any other offense for which the defendant was arrested after committing the offense of conviction, as long as the period of detention has not been credited against another sentence.

The question presented in this case is whether the computation of credit is to be made by the district court at the time of sentencing or by the Attorney General after the defendant begins to serve his federal sentence.

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UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD WILSON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-8a) is reported at 916 F.2d 1115.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 1990. A petition for rehearing was denied on February 11, 1991. App., *infra*, 9a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 3585(b) of Title 18, U.S.C., provides:

> (b) Credit for prior custody.—A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences—
>
> (1) as a result of the offense for which the sentence was imposed; or
>
> (2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;
>
> that has not been credited against another sentence.

STATEMENT

1. In August 1988, respondent participated with two co-defendants in an abortive attempt to rob the Bank of Putnam County in Cookeville, Tennessee, by making threats to the chief executive officer of the bank. Respondent and his co-defendants also threatened harm to the families of four high school students in an attempt to induce the students to help them carry out the scheme. App., *infra*, 2a. Two of the students foiled the plot by reporting it to the authorities. *Ibid.*

In October 1988, respondent was arrested by state officials in connection with several other robberies. On December 15, 1988, while respondent was in state custody, he was indicted in federal court for violating the Hobbs Act, 18 U.S.C. 1951(a), based on his involvement in the Bank of Putnam County incident. He was formally arrested on that indictment on May 15, 1989, but he remained in the custody of the

Putnam County Sheriff pending disposition of the state charges against him. App., *infra*, 2a-3a.

On November 29, 1989, respondent pleaded guilty to the federal charge and was sentenced on that charge to 96 months' imprisonment. At the time of sentencing, the district court orally denied respondent's request that he be given credit against his federal sentence for the time he served in state custody prior to the time his federal sentence was imposed. App., *infra*, 3a. Approximately ten days after respondent was sentenced on the federal charge, he was sentenced on the state charges for which he had been detained. The state court awarded him full credit against his state sentence for the 429 days he had been in state custody, between October 5, 1988, and December 7, 1989. Gov't C.A. Br. Addendum C.

2. The court of appeals held that the district court should have granted respondent credit against his federal sentence for the period he had spent in state custody. The court first held that under 18 U.S.C. 3585(b), unlike its immediate predecessor, 18 U.S.C. 3568 (1982), it is the district court, not the Attorney General, that must award credit for time spent in official detention. The court acknowledged that its ruling on that point was at odds with the Eleventh Circuit's decision in *United States* v. *Lucas*, 898 F.2d 1554 (1990), in which the court held that the Attorney General has exclusive authority under Section 3585(b) to award credit against a federal sentence. App., *infra*, 6a & n.2.

The court of appeals further held that a district court must give credit for a period of state detention as long as that period of detention "has not been credited to some other sentence, state or federal, *at the time sentence is imposed*." App., *infra*, 8a. As a

consequence of that ruling, respondent in effect received double credit for the time he served in state detention, since that time was credited both to his federal sentence and to his subsequently imposed state sentence as well.

The government petitioned for rehearing with suggestion for rehearing en banc, but the petition was denied. App., *infra*, 9a.

REASONS FOR GRANTING THE PETITION

This case presents an important question on which the courts of appeals are divided. The issue affects the administration of the federal prison system and the role of federal courts at sentencing. This Court's review is needed to ensure that decisions regarding the award of credit against federal sentences for time previously served—decisions that are made thousands of times each year—are made in a uniform fashion according to the scheme Congress intended.

1. Before 1987, it was clear that computing and assigning credit to federal prisoners for presentence periods of detention was an administrative duty of the Attorney General, not a judicial function. See 18 U.S.C. 3568 (1982).[1] Under that regime, computation and credit decisions were made according to uniform, nationwide guidelines administered by the Bureau of Prisons. The computation process would

[1] Section 3568 provided as follows:

> The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offenses or acts for which sentence was imposed. As used in this section, the term "offense" means any criminal offense * * * which is in violation of an Act of Congress and is triable in any court established by an Act of Congress.

take place after the defendant had been sentenced and transferred to the custody of the Attorney General; although the Attorney General's decision was subject to judicial review, the sentencing court had no direct role in making the computation and award of credit. *See, e.g., United States* v. *Flanagan*, 868 F.2d 1544, 1546 (11th Cir. 1989); *United States* v. *Martinez*, 837 F.2d 861, 865 (9th Cir. 1988); *United States* v. *Morgan*, 425 F.2d 1388, 1389-1390 (5th Cir. 1970); see also H.R. Rep. No. 1541, 89th Cong., 2d Sess. 4 (1966) ("[u]pon imposition of sentence, the convicted defendant is turned over to the custody of the Attorney General and, therefore, from the administrative standpoint the Attorney General should be the individual who would give credit to the convicted defendant").

In 1984, Congress revised Section 3568, which was recodified as Section 3585(b), to state that "[a] defendant shall be given credit" toward his term of imprisonment for any period of "official detention" for which the defendant was arrested after committing the offense for which he was being sentenced.[2] Because the new statute was silent regarding who was to make the eligibility determinations, the courts have had difficulty deciding whether Congress in-

[2] The new provision, which became effective in November 1987, replaced the term "custody" with the more precise term "official detention." In addition, it authorized credit not only for time spent in custody "in connection with the offense or acts for which sentence was imposed," but also for time spent in official detention "as a result of any other charge," as long as the time spent in detention was not credited to any other sentence. Relying on this language, the Bureau of Prisons awards credit against federal sentences under Section 3585 for time spent in state detention. See *United States* v. *Richardson*, 901 F.2d 867, 870 (10th Cir. 1990).

tended the Attorney General to continue making credit computations and awards, or whether it intended to transfer that responsibility to district courts as part of the sentencing process. Resolution of that question is important not only because it affects the mechanics of sentencing and prison administration, but also because, as this case demonstrates, it can affect the question whether credit is to be awarded at all.

Pointing to the omission in Section 3585(b) of language referring to the Attorney General, the court of appeals in this case held that the new statute was meant to transfer to the sentencing court the responsibility for computing and awarding credit for presentence detention. The Ninth Circuit, in *United States* v. *Chalker*, 915 F.2d 1254 (1990), reached a similar result. Although it held that district courts and the Bureau of Prisons have concurrent responsibility under Section 3585(b) to make credit awards, the *Chalker* court acknowledged that the effect of its ruling was to assign to the district courts the principal responsibility for granting credit for time previously served. See also *United States* v. *Londono-Cardono*, 759 F. Supp. 60 (D.P.R. 1991) (Section 3585(b) reassigned task of awarding credit from Attorney General to sentencing court).

Three other circuits have reached the opposite conclusion. See *United States* v. *Brumbaugh*, 909 F.2d 289, 291 (7th Cir. 1990); *United States* v. *Lucas*, 898 F.2d 1554, 1556 (11th Cir. 1990); *United States* v. *Woods*, 888 F.2d 653, 654 (10th Cir. 1989), cert. denied, 110 S. Ct. 1301 (1990). Those courts have held that the Bureau of Prisons, as the Attorney General's designee, retains exclusive authority under Section 3585(b) to award credit for time served, and that a prisoner seeking relief from a decision denying

credit must exhaust his administrative remedies within the Bureau of Prisons before seeking judicial review of the decision.

The conflict among the circuits has resulted in an administrative nightmare for the Bureau of Prisons, which has prisoners from every judicial circuit and operates facilities in every circuit but the First. Because credit decisions in some circuits are now being made by individual sentencing judges, rather than through application of uniform national guidelines administered by the Bureau of Prisons, similarly situated prisoners in the same facility may be subject to different treatment with respect to the award of credit for time served. Moreover, with respect to defendants sentenced in circuits that have not yet addressed the issue, Bureau of Prisons officials can only guess whether the Bureau is responsible for making credit decisions or whether the Bureau must defer to the sentencing court. The current fragmented system of resolving this frequently recurring issue will continue to engender confusion, unnecessary litigation, and disparate treatment of similarly situated defendants until the issue is settled. This Court should therefore resolve the conflict among the circuits on this question.

2. The language and purposes of Section 3585(b) strongly suggest that the credit determination is not to be made by the court at sentencing, but by the Bureau of Prisons at some point after the defendant begins to serve his sentence. To begin with, Section 3585(b)(1) provides that defendants must be awarded credit for time spent in official detention as a result of the offense "for which the sentence *was* imposed" (emphasis added). Likewise, Section 3585(b)(2) mandates credit for time in detention as a result of any other charge for which the defendant

was arrested after the commission of the offense "for which the sentence *was* imposed" (emphasis added). In this respect, Section 3585(b) is identical to its predecessor, Section 3568, which also provided that credit be awarded in connection with the offense "for which sentence *was* imposed" (emphasis added). In both provisions, the use of the past tense indicates that the award of credit would be made some time after sentencing rather than contemporaneously with the imposition of sentence.

Section 3585(b) also states that credit must be awarded for time spent in official detention "prior to the date the sentence commences." Section 3585(a) makes clear that a sentence commences not on the date of sentencing, but "on the date the defendant is received in custody" or "arrives voluntarily to commence service" of the sentence at the facility at which it is to be served. As this case illustrates, the district court will often not be able to determine at sentencing how much time the defendant will have served in official detention for which he is eligible to receive credit by the time he begins to serve his federal sentence.[3] The Bureau of Prisons, by contrast, need not speculate about the amount of credit to which a defendant is entitled on the date he commences to serve his sentence. As the federal agency responsible for receiving new prisoners, the Bureau of Prisons can make that calculation when the defendant begins serving his term. Since the Bureau of Prisons, and not the district court, is in the position to carry out

[3] As respondent's state judgment and commitment order reveals, see Gov't C.A. Br. Addendum C, he remained in state custody for several days after he was sentenced on the federal charges, but before he commenced serving either his state or federal sentence. He ultimately received credit for that interim period against his state sentence.

the statutory requirement that a defendant receive credit for time served up to the date of commencement of his sentence, it makes sense to read the statute to preserve the Bureau of Prisons' traditional role in making the credit determination.

Although the court of appeals attached great weight to the omission of any reference to the Attorney General in Section 3585(b), it seems quite unlikely that Congress would have abandoned the long-standing statutory delegation of responsibility in this area to the Attorney General without doing so explicitly. Congress made the court's decisionmaking authority in other sentencing matters plain by repeatedly including the phrase "the court shall" or "the court may" in statutory provisions closely related to the one at issue here. See 18 U.S.C. 3582(a), (c) and (d) (court's authority to impose a sentence of imprisonment); 18 U.S.C. 3583(a) and (c)-(g) (court's authority to impose term of supervised release following imprisonment); 18 U.S.C. 3584(b) (court's authority to impose concurrent or consecutive sentences). If Section 3585(b) was intended to depart from prior law by assigning to sentencing courts the responsibility for awarding credit for time served, it surely would have been drafted with the specificity that is evident in those other sections.[4]

[4] The legislative history of Section 3585 is silent on the question of what entity is to award credit for time served. That silence bolsters the conclusion that the new statute did not shift responsibility for making credit awards to the sentencing court. The Senate Report summarizes the predecessor statute without alluding to the delegation of authority to the Attorney General, and the discussion of Section 3585(b) does not advert to the omission of an express delegation. See S. Rep. No. 225, 98th Cong., 2d Sess. 128-129 (1984). As the Seventh Circuit observed in *United States* v. *Brumbaugh*, 909 F.2d at 291, "[c]ertainly, if Congress had decided to make

The court of appeals' conclusion that district courts are authorized to award credit for time served under Section 3585(b) is also incompatible with the statute's explicit prohibition against "double counting" —that is, the command that a defendant not receive credit for a period of detention that is credited against another sentence. As this case illustrates, a defendant may be eligible to receive credit for the same period of detention against both his state and federal sentence. If the district court imposes sentence before the defendant is sentenced on the state charges, the court will not be in a position to predict at sentencing what the state court will do. Thus, the federal court may end up shortening the defendant's sentence to take account of the same period of detention for which he subsequently receives credit from the State—exactly what happened in this case.

That outcome is contrary to the statutory command that credit be given only for a period of detention "that has not been credited against another sentence." Section 3585 contains a flat ban on double counting, not one that is conditioned on whether credit has already been awarded when the federal sentence is imposed. Yet the court of appeals, in effect, read such a condition into the statute, because the result of assigning responsibility for the credit decision to the sentencing court is that the same period of detention counts twice whenever the state award of credit postdates the sentencing for the federal offense. Thus, the court of appeals had to rewrite Section 3585(b) in order to legitimate the double counting that is the inevitable outcome of the

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such a significant change in the allocation of responsibility in the sentencing function, the legislative history—comprehensive on so many other areas of criminal law reform—would reflect that policy choice."

sentencing courts' administration of that Section.[5] Nothing in the statute, however, remotely supports that result, and there is no sound reason why a defendant should receive the windfall of double credit for a single period of detention simply because of a fortuity of timing.

The anomaly produced by the court of appeals' ruling can be avoided, and the double counting ban applied as written, if the award of credit is treated as an administrative task that permits adjustments after the date of sentencing. In the course of a defendant's service of his federal sentence, it will ordinarily become clear whether the defendant has been given credit on other sentences for periods of detention that fall within the scope of Section 3585(b). If the credit determination is an administrative task, rather than part of the sentencing process, adjustments can be made during the defendant's sentence to account for later awards of credit on other sentences imposed after the federal sentence. But such adjustments cannot easily be made if the credit determination is one for the sentencing court to make as part of the imposition of the federal sentence.

Thus, the double counting prohibition of Section 3585(b) necessarily contemplates a scheme with the flexibility to adjust to changing circumstances. If the court of appeals had held that the credit determination was for the Bureau of Prisons to make, the

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[5] Significantly, the court described Section 3585(b) as mandating "full credit for the total custodial presentence detention arising from both state or federal offenses so long as that time has not been credited to some other sentence *at the time federal sentence is imposed.*" App. *infra*, 82. That paraphrase is accurate except for the last clause, which has no grounding whatever in the language of the statute.

Bureau could simply have noted the award of credit on respondent's state sentence and followed the statutory prohibition against double counting by refusing federal sentence. Instead, since the sentencing process lacks that flexibility, the court of appeals' construction of Section 3585(b) as a sentencing provision drove it to grant double credit for the detention period in spite of the express statutory prohibition against double counting. Because the court's decision conflicts with the decisions of other courts of appeals and departs sharply from the traditional and natural construction of an important statute, this Court should grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1991

APPENDIX A

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

No. 89-6583

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RICHARD WILSON, DEFENDANT-APPELLANT

Argued July 31, 1990

Decided Oct. 23, 1990

Before KEITH and KRUPANSKY, Circuit Judges, and JORDAN, District Judge.*

KRUPANSKY, Circuit Judge.

Defendant-appellant Richard Wilson has appealed from the sentence imposed in a judgment entered by the United States District Court for the Middle District of Tennessee pursuant to a guilty plea for conspiring to obstruct, delay, or affect commerce by the robbery of money from a bank and the threat of physical violence in furtherance of that plan, in violation of 18 U.S.C. § 1951.[1]

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* The Honorable Leon Jordan, United States District Judge for the Eastern District of Tennessee, sitting by designation.

[1] (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or at-

Appellant organized a group of seven individuals, including himself, to commit a series of robberies involving the use of firearms provided by appellant in the Cookeville, Tennessee area. Appellant and two codefendants recruited four high school students by threatening to kill members of their families. During the month of August, 1988, appellant conspired with his codefendants to rob the Bank of Putnam County by forcing entry into the residence of Jack Ray, the chief executive officer of the bank, and, by threatening physical harm to him and/or his wife, inducing Ray to accompany the conspirators to the bank, where they would rob it of its funds. The first attempt was aborted when one of the students, Robert Jones, panicked and refused to enter the Ray residence. The second attempt failed when two of the other high school students reported the plot to authorities.

Appellant was arrested by state authorities on October 5, 1988, apparently in connection with various other robberies and remained in state custody through the date of his sentencing in the present case. Appellant was indicted December 15, 1988 on the instant federal offense. On that date, an arrest warrant was also issued which was signed and returned by the United States Marshal's Office on May 17, 1989. On December 16, 1988, a federal detainer was issued against the appellant. On May 15, 1989 and thereafter, when the appellant was required to ap-

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tempts or conspires to do so, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951(a). Attempt and conspiracy are written into this section, and it was unnecessary to charge appellant with a separate crime of attempt or conspiracy.

pear before the federal court, the district court issued orders to the sheriff of Putnam County, Tennessee to produce the "prisoner ad prosequendum." Throughout the entire period from October 5, 1988 to appellant's sentencing in the instant case on November 29, 1989, appellant was in the custody of the Putnam County Sheriff pending disposition of various state criminal charges.

On November 29, 1989, Wilson pleaded guilty, pursuant to a plea agreement in which the government recommended that the sentence not exceed 96 months. Following a sentencing hearing, the district court fixed the offense level at 26, which included a four-level increase for being an organizer and leader of criminal activity involving five or more persons. The offense level was reduced two levels to 24 for acceptance of responsibility for the offense. The defendant's criminal history category was determined to be I, resulting in a guideline range of 51 to 63 months of incarceration. The court thereupon departed upward from the guidelines by imposing a sentence of 96 months. Appellant requested credit for time served as a result of his presentence state custody, but his request was denied by the trial court. Appellant filed a timely notice of appeal.

In support of its upward departure from the guidelines, the court concluded that appellant was the primary organizer and leader of a criminal activity which involved five or more participants, "the one with the greatest control, the ultimate decision maker"; that appellant had, by coercion and threats of physical violence against family members of four participating high school students, induced their involvement; that Wilson's criminal history category inadequately reflected the seriousness of his past criminal conduct; and that the conspiracy included

a plan to abduct or physically restrain one or more persons.

On appeal, appellant has charged that the district court erred by unreasonably departing upward from the sentencing guidelines in the imposition of sentence and in failing to grant appellant credit for the time he was in state custody from October 5, 1988 until he entered upon service of his federal sentence in the instant case pursuant to 18 U.S.C. § 3585 (b) (2).

Upon review of the record in its entirety, the briefs of the parties, and the arguments of counsel, the district court's upward departure from the guidelines is affirmed because the district court committed no factual or legal errors in the direction and degree of the departure. *See United States v. Rodriguez*, 882 F.2d 1059, 1067 (6th Cir. 1989).

The statute addressing credit toward the service of a term of imprisonment provides:

> A defendant *shall* be given credit toward the service of a term of imprisonment for *any* time he has spent in official detention prior to the date the sentence commences—
>
> > (2) as a result of *any* other charges for which the defendant was arrested *after* the commission of the offense for which the sentence was imposed
>
> that has not been credited against another sentence.

18 U.S.C. § 3585(b) (2) (emphasis added).

The interpretation of a statute is a question of law and is reviewed *de novo*. *Vause v. Capitol Poly Bag, Inc.*, 886 F.2d 794, 798 (6th Cir. 1989). "The objective of statutory construction is to 'ascertain the intent of Congress.'" *Vause*, 886 F.2d at 798. "The

starting point in determining legislative intent is the language of the statute itself." *Id.* (*citing Blum v. Stenson*, 465 U.S. 886, 896, 104 S.Ct. 1541, 1548, 79 L.Ed.2d 891 (1984); *Watt v. Alaska*, 451 U.S. 259, 265, 101 S.Ct. 1673, 1677, 68 L.Ed.2d 80 (1981)). Only when the intent of Congress is unclear, does the court turn to legislative history. *Id.* at 801. "It is an ancient rule of statutory construction that penal statutes should be strictly construed against the government . . . and in favor of the persons on whom penalties are sought to be imposed." 3 N. Singer, Sutherland Stat. Const. § 59.03, at 11 (4th ed. 1984) (citing, *e.g.*, *Busic v. United States*, 446 U.S. 398, 100 S.Ct. 1747, 64 L.Ed.25 381 (1980); *United States v. Cox*, 593 F.2d 46 (6th Cir. 1979)).

Section 3585(b) (2) became effective for crimes committed on or after November 1, 1987, along with the balance of the Sentencing Reform Act of 1984, Pub. L. 98-473, tit. II, 98 Stat. 1976 (1984). Credit for presentencing custodial time served for crimes committed prior to November 1, 1987 was governed by former 18 U.S.C. § 3568 which read in pertinent part:

> The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offenses or acts for which sentence was imposed. As used in this section, the term "offense" means any criminal offense . . . which is in violation of an Act of Congress and is triable in any court established by Act of Congress.

18 U.S.C. § 3568 *repealed by* Sentencing Reform Act of 1984, Pub. L. 98-473, tit. II, § 203(a), 98 Stat. 1976, 1976 (1984). The language of the new statute is both broad and mandatory, rather than

narrow and permissive, stating that a defendant "*shall* be given credit" for "*any* time he has spent in official detention . . . as a result of *any* other charges."

Under former section 3568, the duty to credit presentencing custodial time served was delegated exclusively to the Attorney General. The language of the new statute, however, has deleted all reference to the Attorney General, reflecting a congressional intent to withdraw its theretofore delegation to the Attorney General to credit presentencing custodial time served pursuant to former 18 U.S.C. § 3568. It is also worthy of note that section 3585(b)(2) is incorporated into Chapter 227 of title 18 styled "Sentences" and is itself specifically styled "Calculation of a Term of Imprisonment," which delegates the authority to impose sentence upon the trial judge, which authority includes the duty to *calculate* and *credit* presentence custodial time in the determination of the sentence of a convicted offender at the time of sentencing.[2]

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[2] This court finds the reasoning of the Eleventh Circuit in *United States v. Lucas*, 898 F.2d 1554 (11th Cir.1990) to be unpersuasive. First, it is unnecessary to address the legislative history where the language of the statute is clear and unambiguous. *Caminetti v. United States*, 242 U.S. 470, 486, 37 S.Ct. 192, 194, 61 L.Ed. 442 (1917); *Vause*, 886 F.2d at 801. Second, the language of the statute was obviously materially changed. The court must accordingly presume that the radical departure from the language of former § 3568 reflected a congressional intent to rescind the authority of the Attorney General to credit presentencing custodial time. Finally, the Eleventh Circuit's observation that the Justice Department's failure to change its regulations subsequent to the enactment of section 3585 is of no consequence as those regulations refer to a broad delegation of the Attorney General's duties concerning prisons and prisoners and have historically refrained from addressing the issues joined by section 3585. *See* 28 C.F.R. §§ 0.96, 542.10-.16 (1989).

It is true that pursuant to former section 3568, some case law construing that old statute limited the credit of presentencing confinement to time served while in federal custody. *See, e.g., United States v. Garcia-Gutierrez*, 835 F.2d 585, 586 (5th Cir. 1988) (construing former section 3568); *United States v. Blankenship*, 733 F.2d 433, 434 (6th Cir. 1984) (same). Here again, however, the significant change in the language of newly enacted section 3585(b)(2) to read "*any* time . . . spent . . . as a result of *any other* charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed that has not been credited against another sentence" (emphasis added), discloses a congressional intent to credit both state and federal presentencing custodial time against a federal sentence.

The Tenth Circuit, in *United States v. Richardson*, 901 F.2d 867 (10th Cir. 1990), applied the plain language of section 3585 literally. In that case, the defendant was arrested by Denver police in early July, 1988 (exact date unknown) and charged with possession of cocaine. *Id.* at 870. When the possession charge was dropped on October 5, 1988, he was taken into federal custody on counterfeiting conspiracy charges. *Id.* The Tenth Circuit concluded that the district court erred in failing to credit the defendant with time served prior to October 5. *Id.* After quoting section 3585(b), the court analyzed the facts of the case and reasoned that since the counterfeiting conspiracy had occurred prior to defendant's state custody and his time had not been credited to any other sentence, the case should be remanded to the district court with instructions to credit the federally imposed sentence with the total presentencing custodial time, both state and federal, from the date he was originally taken into custody. *Id.*

This Circuit adopts the *Richardson* analysis. Applied to the facts of this case, appellant's violation of 18 U.S.C. § 1951 occurred prior to his being taken into state custody on October 5, 1988. On November 29, 1989, when the appellant was sentenced for the federal crime to which he pleaded guilty, he had not been credited with any of the time that he had served in state custody as a result of any state or federal offense.[3] Section 3585 mandates full credit for the total custodial presentence detention arising from both state or federal offenses so long as that time has not been credited to some other sentence *at the time federal sentence is imposed.*

In summary, this court concludes that a federal district court has the initial authority and duty to apply the mandate of 18 U.S.C. § 3585 at the time the court imposes sentence for a federal offense, and that credit for presentence custodial detention served includes time served as a result of a federal and/or state offense if such detention was imposed subsequent to the commission of the federal offense for which the defendant is being sentenced and as long as the time served has not been credited to any other sentence, state or federal, at the time sentence is imposed in the case immediately before the court.

Accordingly, for the reasons stated herein, the district court's judgment and sentence is AFFIRMED as to the upward departure from the guidelines. The case is REMANDED to the district court to resentence the appellant in a manner not inconsistent with the directions of this opinion.

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[3] At the time of sentencing, the appellant and state prosecutors had only a tentative agreement for resolving the state charges pending against appellant. Transcript of Sentencing Hearing, November 29, 1989, at 43-44.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 89-6583

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RICHARD WILSON, DEFENDANT-APPELLANT

[Filed Feb. 11, 1991]

Before: KEITH and KRUPANSKY, Circuit Judges; and JORDAN, United States District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

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* Hon. Leon Jordan sitting by designation from the Eastern District of Tennessee

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1990

No. 90-1745

UNITED STATES OF AMERICA,
Petitioner,

v.

RICHARD WILSON,
Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, Richard Wilson, asks leave to file the attached Brief in Opposition to Petition for Writ of Certiorari, pursuant to Rule 15.1 and Rule 39.5 of the Supreme Court Rules and to proceed in forma pauperis. The Respondent was found to be indigent in the District Court and the Federal Public Defender's Office for the Middle District of Tennessee was appointed under the Criminal Justice Act. 18 U.S.C. §3006A(d)(6). The Respondent proceeded in forma pauperis in the Court of Appeals for the Sixth Circuit and was represented by the Federal Public Defender's Office for the Middle District of Tennessee. Pursuant to Rule 39.1 of the Supreme Court Rules, no affidavit of indigency is required.

Respectfully submitted,

HENRY A. MARTIN
Federal Public Defender

DEBORAH S. SWETTENAM
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810 Broadway, Suite 200
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(615) 736-5047

CERTIFICATE OF SERVICE

I, Deborah S. Swettenam, a member of the Bar of this Court, hereby certify that on the 14th day of June, 1991, a copy of the foregoing Motion for Leave to Proceed In Forma Pauperis was mailed, first class postage prepaid, to Joel M. Gershowitz, Attorney, Department of Justice, Washington, DC 20530.

DEBORAH S. SWETTENAM

No. 90-1745

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

United States of America, Petitioner

v.

Richard Wilson, Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Section 3585(b) of Title 18 provides that a defendant shall be given credit toward the service of a term of imprisonment for any period he has spent in official detention before beginning his sentence. Credit is awarded if the detention is attributable to the offense of conviction or to any other offense for which the defendant was arrested after committing the offense of conviction, as long as the period of detention has not been credited against another sentence.

The question presented in this case is whether the computation of credit is to be made by the district court at the time of sentencing or by the Attorney General after the defendant begins to serve his federal sentence.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NO. 90-1745

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD WILSON

ON PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 916 F.2d 1115.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 1990. A petition for rehearing was denied on February 11, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 3585(b) of Title 18, U.S.C., provides:

(b)Credit of prior custody.--A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences--

(1) as a result of the offense for which the sentence was imposed; or

(2) as a result of any other charge for which the respondent was arrested after the commission of the offense for which the sentence was imposed;

that has not been credited against another sentence.

STATEMENT OF THE CASE

1. Richard Wilson was indicted on December 15, 1988, for conspiracy from August 1, 1988, to September 1, 1988, to affect commerce by robbery of money from the Bank of Putnam County, Monterey, Tennessee in violation of Title 18 U.S.C. 1951. At the time of his indictment Mr. Wilson was in state custody, having been arrested on October 5, 1988. A detainer was placed on Mr. Wilson by federal authorities on December 16, 1988. Mr. Wilson was formally arrested on the indictment on May 15, 1989.

On November 29, 1989, the defendant tendered a guilty plea to the federal charge pursuant to a plea agreement with the government. Under the plea agreement the government recommended that the sentence not exceed 96 months. The court sentenced him to

serve 96 months and denied the respondent's request to be given credit for time he had spent in state custody pursuant to 18 U.S.C. 3585(b)(2).

2. The court of appeals held that the district court should have granted respondent credit against his federal sentence for the period he had spent in state custody. First, the court held that a federal district court has the initial authority and duty to apply the mandate of 18 U.S.C. 3585 at the time the court imposes sentence for a federal offense. Second, the court held that credit for presentence custodial detention served includes time served as a result of a federal and/or state offense if such detention was imposed after the commission of the federal offense for which the defendant is being sentenced and as long as the time served has not been credited to any other sentence, state or federal, at the time sentence is imposed in the case immediately before the court. The government petitioned for rehearing with suggestion for rehearing en banc, but the petition was denied.

REASONS FOR DENYING THE WRIT

This case presents an issue that is not ripe for review by the Supreme Court. The lower courts have not had the opportunity to determine the proper forum for computation of credit decisions. Further, the court of appeal's decision granting credit for time spent in state custody is correct and does not conflict with any opinion of this court. Further review is therefore unwarranted.

1. In 1984, Congress revised section 3568, which was recodified as section 3585(b). Section 3585(b) mandates credit for time in detention for "any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed."[1] Section 3585(b) further states that credit must be awarded for time spent in official detention "prior to the date the sentence commences."[2] Sentences for section 3585(a) purposes commence not on the date of sentencing, but "on the dates the defendant is received in custody" or "arrives voluntarily to commence service" of the sentence at the facility at which it is to be served.[3]

Before Congress enacted section 3585, calculation of a term of imprisonment was governed by 18 U.S.C. 3568 which provided that the Attorney General give any person credit towards service of his sentence for time spent in custody in connection with the offense or acts for which sentence was imposed.[4] Petitioner argues that

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[1]Section 3585(b) of Title 18, U.S.C., provides:
(b) Credit for prior custody.--A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences--
(1) as a result of the offense for which the sentence was imposed; or
(2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;
that has not been credited against another sentence.

[2]Id.

[3]Id.

[4]Section 3568 provided as follows:
The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in

the district courts are ill equipped to determine how much time the respondent has served in official detention for which he is eligible to receive credit by the time he begins to serve his federal sentence. Petitioner, however, offers no facts in support of this position. Further, no guesswork on the part of the district court is involved. The statute is clear that a defendant "shall be given credit" for "any time he has spent in official detention...as a result of any other charge."[5] The task of giving credit for time served is clearly not beyond the expertise of the district courts.

2. Petitioner relies on inconsistent analysis of 18 U.S.C. 3585(b) among the circuits as grounds for seeking certiorari. Petitioner, however, fails to produce, much less prove, any problems resulting from the various interpretations. First, petitioner speculates that without further judicial review the Bureau of Prisons faces an "administrative nightmare," in which prisoners within the same facility are subject to different treatment under the sentence credit guidelines. Petitioner fails to identify a single instance of differential treatment or to cite any statistics indicating the scope, or even the existence, of this "nightmare." Further, petitioner does not allege that differences in jail credit computation will be any more troublesome than

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connection with the offenses or acts for which sentence was imposed. As used in this section, the term "offense" means any criminal offense... which is in violation of an Act of Congress and is triable in any court established by an Act of Congress.

[5]18 U.S.C. 3585(b), emphasis added.

different sentences for similar offenses which have been served within the prison system since the first prison was built and continues until today, federal sentencing guidelines notwithstanding. In the absence of any showing of actual administrative or judicial confusion, or of any unequal treatment of prisoners, this Court should not grant certiorari.

Section 3585(b) makes no designation of authority to the Attorney General to grant credit for time served.[6] Petitioner argues that Congress would not have abandoned "traditional" statutory delegation of responsibility in this area to the Attorney General without doing so explicitly. From 1966-1987 the granting of credit for time served was a purely administrative function. This hardly establishes a "tradition" or "long-standing rule." Prior to 1966 the granting of credit for time served was solely a judicial function and credit was granted at the discretion of the court.[7] Even after 1966, the decision was initially administrative but courts also had authority to grant credit.[8] By not specifically granting the Attorney General the authority to award credit for time served, the authority was once again vested in the courts.

By disregarding the changes between repealed Section 3568 and reenacted section 3585, petitioner ignores a long standing rule of

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[6]The legislative history of Section 3585(b) lacks any statement of congressional intent either to alter or retain the previous administrative authority to compute sentences.

[7]Soyka v. Alldredge, 481 F.2d 303 (3d 1973).

[8]Id., at 305 n.6.

statutory construction. "It is a canon of statutory construction that where . . . the words of a later statute differ from those of a previous one on the same or related subject, the legislature must have intended them to have a different meaning."[9] Congress could have repeated the section 3568 grant of authority to the Attorney General in the reenacted section 3585. It chose not to do so. Petitioner argues that the court should ignore Congress's failure to repeat the language of section 3568 in reenacted section 3585(b). To do so would be to ignore the changes intended by Congress.

Historically, it is assumed that Congress intends what it enacts.[10] Section 3585 falls within Chapter 227 of Title 18, styled "Sentences." The context is one in which trial judges are given authority to calculate the term of a sentence. Logically, if Congress intended the Attorney General to be given the authority for granting credit for time served they would have done so in Chapter 229 of Title 18, entitled Post-Sentence Administration. Chapter 229 is devoid of any such grant of authority.

It must further be presumed, as a canon of statutory interpretation, that "penal statutes should be strictly construed against the government . . . and in favor of the persons on whom

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[9]Klein v. Republic Steel Corp., 435 F.2d 762,765-66 (3d Cir. 1970) (footnote omitted); See also Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439, 1444 (D.C. Cir. 1988), cert. denied, 488 U.S. 1010 (1989).

[10]United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980).

the penalties are sought to be imposed."[11] The court below correctly ruled that the statute is not ambiguous. Even if ambiguities were to be found, the historically accepted way of resolving them would be in favor of the sentenced person. Here any alleged ambiguity would be resolved in the manner most favorable to Richard Wilson, namely by conceding to the trial court the mandatory task of awarding sentence credits where they are due.

3. Petitioner asserts facts outside of the record to allege that Mr. Wilson should not have been given the credit toward service of his sentence to which he was clearly entitled under 18 U.S.C. Section 3585(b)(2). In the court of appeals, the government attempted to utilize Rule 10(f) of the Rules of Appellate Procedure to place in the record copies of judgments in state court entered after his sentencing in federal court. Relying on these judgments not properly in the record, petitioner asserts perfunctorily that the subsequent giving of credit for jail time served prior to conviction and sentencing by the state court was incompatible with Section 3585(b)(2)'s prohibition against "double counting." Petitioner alleges that the federal court shortened Wilson's sentence to take account of the same period of detention for which he subsequently received credit from the state.

Petitioner's assertion of a 'windfall' of double credit is completely unsubstantiated by the case record. Mr. Wilson received no benefit from being given credit for his days in custody

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[11]N. Singer, 3 Sutherland Statutory Construction §59.03, at 11, (4th ed. 1984) (citing, e.g., Busic v. United States, 446 U.S. 398 (1980).

against his state sentence. The Tennessee prison authorities have never officially credited Mr. Wilson with the 429 days spent in jail prior to being sentenced in Putnam County, Tennessee, because the authorities were unaware of the sentences. Indeed, the record in this case clearly established that at the time he was sentenced in federal court on November 29, 1989, credit against another sentence had not been given for the time he spent in custody since October 5, 1988. Petitioner, however, now seeks to transform the record to present additional evidence showing that the respondent was sentenced in state court on December 12, 1989, in three cases and granted jail credit of 429 days from October 5, 1988, to December 7, 1989. Respondent objects to such alteration of the record and to consideration of such subsequent facts. Fundamental fairness and due process of law cannot withstand a procedure in which review of a trial court's application of law to facts is circumvented by the admission into the record of additional facts which were not in existence at the time of the trial court's decision.[12]

Moreover, the subsequent giving of credit for Mr. Wilson's jail time was simply a meaningless gesture since his state sentences totally merge with the federal sentence. The state sentence imposed against Mr. Wilson was ordered to run concurrently with the federal sentence. In response to the government's attempt to supplement the record, the respondent in

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[12] See United States v. Allen, 522 F.2d 1229, 1235 (6th Cir. 1975); Sovereign New Co. v. United States, 690 F.2d 569, 571 (6th Cir. 1982).

his reply brief in the court of appeals submitted information by affidavit.[13] As shown by the information contained in the addendum to the reply brief in the court of appeals, under the state sentence with the credit given for 429 days of custody, respondent is eligible for release from the state sentences on April 5, 1993. If he is not given such credit, it can be estimated by adding the 429 days to his April 5, 1993, release date that he would be eligible for release from the state sentences on June 5, 1994. Considering his federal sentence of eight years and assuming his federal sentence commenced on December 12, 1989, when the state sentences were imposed and ordered to run concurrently with his federal sentence, it is obvious that the 429 days in jail prior to sentencing was simply dead time for Mr. Wilson. His federal sentence requires significantly longer imprisonment than his concurrent state sentences, even if credit is not given against his state sentence. Respondent can be expected to remain imprisoned for seven years. This expected time of imprisonment takes into consideration the 54 days of good time which could be granted at the end of each year of time served.[14] Accordingly, assuming commencement of the federal sentence on December 12, 1989, the respondent could expect release from a federal sentence in December of 1996. Even with credit for 429 days, release from the federal

[13]Consistent with its ruling that credit for custody should be initially determined by the district court at the time of sentencing, the court of appeals made no reference either to the government's proposed supplement or to the affidavit appended to respondent's reply brief.

[14]See 18 U.S.C. §3624(b).

sentence would still be no earlier than October of 1995. Comparably, respondent is eligible for release from his state sentences, even without credit for 429 days of jail time, more than one year and four months earlier than his expected release from his federal sentence if given credit against his federal sentence for the 429 days. Without credit for the 429 days, he is imprisoned for more than 2 years and 6 months beyond his state sentences. Clearly, the respondent neither received double credit for time served, nor a "windfall" of any kind. The court's decision below is fair and equitable regarding the grant for credit for time served and should not be disturbed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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(3)

No. 90-1745

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD WILSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1745

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD WILSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Respondent bases much of his argument on the assertion that the Sentencing Reform Act "place[d] the resolution of all factors that would influence the release date of an incarcerated defendant in the hands of the sentencing judge." Br. 15. That assertion, however, does not accurately describe what Congress did in the Sentencing Reform Act.

The principal goals of the Sentencing Reform Act were to obtain consistency in the duration of imprisonment for similarly situated offenders, and to eliminate "uncertainty as to the time the offender would spend in prison." *Mistretta* v. *United States*, 488 U.S. 361, 366 (1989). See also S. Rep. No. 225, 98th Cong., 1st Sess. 44-49 (1983). The calculation of sen-

tencing credit has nothing to do with eliminating uncertainty as to the total *duration* of a defendant's prison term, but only with deciding how much of the sentence the offender has left to serve. Thus, awarding credit against a sentence for prior detention is fundamentally different from deciding *how long* the offender should spend in jail. It was the inconsistency and unpredictability in the latter decision that Congress sought to eliminate through sentencing reform. See S. Rep. No. 225, *supra*, at 46-48.

Although Congress stated that its goal was to maximize certainty in "the prison release date at the time of the initial sentencing," S. Rep. No. 225, *supra*, at 46, that statement should not be construed to require identification at sentencing of the exact day on which the prisoner will be released. As the Senate Report makes clear, what Congress sought to achieve was not certainty as to the release date as such—which corresponds only to the portion of the prison term the offender has left to serve—but certainty as to the total length of the period the defendant would spend in prison. The "grave defect of [preexisting] law" was that "no one is ever certain how much time a particular offender will serve" for the offense for which he was being sentenced. S. Rep. No. 225, *supra*, at 49. To remedy that defect, Congress designed a system in which, with the exception of good time credits earned in prison, the "sentence imposed by a judge * * * will represent the actual period of time that the defendant will spend in prison." *Id.* at 115; see also *id.* at 56.

Calculating the credit due at sentencing in order to fix a precise "release date" does violence to the terms of 18 U.S.C. 3585 and undermines the goal of eliminating sentencing disparities for similar offenders. The purpose of the sentencing credit provision,

like the Sentencing Reform Act as a whole, is to ensure that the length of the sentence the court imposes equals the amount of time the offender spends behind bars. As we note in our opening brief, not every prisoner begins to serve his federal sentence immediately after it is imposed. Prisoners such as respondent, who are borrowed from state custody for prosecution and sentencing, may begin to serve their federal sentence days, weeks, or even years after it is imposed, and may be eligible to receive credit for intervening periods of custody. See Gov't Br. 3-4 & n.2; see also, *e.g.*, *Causey* v. *Civiletti*, 621 F.2d 691, 693-694 (5th Cir. 1980) (offender returned to state custody following federal sentencing to stand trial on state charges); *Bloomgren* v. *Belaski*, 948 F.2d 688 (10th Cir. 1991) (defendant arrested by state authorities while free on federal appeal bond).

Section 3585 is designed to prevent an offender who begins to serve his federal sentence following an intervening period of detention from being confined for a longer period than an offender who begins to serve his federal sentence immediately. If the sentencing court has the responsibility for calculating sentencing credit under the statute, however, the total period that a defendant spends in incarceration will depend on the timing of his sentencing, not on the length of the sentence he receives.[1]

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[1] Respondent maintains (Br. 9) that the sentencing court must determine "the availability of prior jail time credits" because the time the defendant has already served on his sentence "inevitably [will] inform[]" the court's choice of a sentence within the sentencing range under the Sentencing Guidelines, or its decision to depart from the Guidelines range. Respondent's suggestion that the time a defendant has already spent in custody—or, alternatively, the portion of the

That Congress could not have intended this result is apparent from the plain terms of Section 3585, which states that periods of detention up to the time an offender commences to serve his sentence—not just up to the time of sentencing—shall "count" toward the sentence. That aspect of the statute cannot be squared with the sentencing court's exercise of the exclusive authority to award sentencing credit. Contrary to respondent's suggestion (Br. 15), sentencing credit is thus quite similar to good time credit, in that it is "not subject to determination at the time of imposition of sentence." Congress recognized this fact in the structure and wording of Section 3585. See Gov't Br. 12-13. Congress also required that events both before and after sentencing be taken into account in the credit calculation by explicitly banning the awarding of double credit for the same period of detention. As we explained in our opening brief, at 13-17, the double credit ban is unworkable if the calculation of sentencing credit is not timed to reflect post-sentence events. Unlike BOP, the sentencing court cannot make routine post-sentence adjustments in the calculation of sentencing credit.[2]

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sentence that remains to be served—is a proper or unavoidable consideration in fixing the total length of sentence is contrary to the spirit and terms of Section 3585. In mandating the award of full credit against the total length of sentence for eligible periods of detention, Congress decided that such periods, whether served before sentencing or after, were to be regarded as equivalent for the purpose of satisfying the sentence. Increasing the length of the sentence to discount time previously served would undermine Congress's evident intention to give full credit for eligible periods of incarceration that predate sentencing.

[2] Respondent contends that BOP's authority to adjust sentencing credit in response to an award of credit against a state

Respondent suggests (Br. 18 n.3) that a sentencing court can take post-sentence periods of detention into account by stating, in its judgment and commitment order, that, in addition to receiving a precise amount of credit for presentence detention, the offender "will also receive credit for the days between imposition of sentence and arrival at the prison." Upon the offender's arrival at prison, respondent argues, the administrator has "only to add these two figures to the time in custody at the institution" to determine the release date. *Ibid.* Respondent's proposal rests on the unwarranted assumption that the sentencing court can predict whether the offender will be entitled to credit for the entire period between sentencing and the commencement of his sentence. That determination depends on many factors, including whether the offender is in custody during the entire period, whether the custody in question counts as "official detention" eligible for credit, and whether the time is credited to another sentence. Those circumstances, by definition, cannot be known at the time of sentencing, but must be determined by the administrator charged with carrying out the court's order. Thus, respondent's pro-

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sentence that is imposed after federal sentencing undermines the State's authority to "choose whether to order its sentence concurrent or consecutive, vary the length of the sentence within the limits of state sentencing laws and any plea agreement, and, if the defendant is in state custody, choose whether to release the defendant for the service of the federal sentence." Br. 23. BOP's decision to adjust credit on a federal sentence to take into account a redundant state award in no way trenches on the State's authority to sentence as it chooses and to award credit against a state sentence for a period of prior custody. Rather, it ensures that the same period of detention is not credited against more than one sentence in defiance of federal law.

posal effectively amounts to a delegation to BOP of responsibility for calculating post-sentence custody credit, with the courts retaining authority to calculate presentence custody credit. That is no different in practice from a system of concurrent authority over sentencing credit. Yet even respondent acknowledges (Br. 17 n.2) that Congress did not intend the courts and BOP to exercise "shared responsibility" in this area.[3]

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[3] Respondent cites (Br. 23) Fed. R. Crim. P. 35(a)(2) and (c) as providing a mechanism for correcting or adjusting jail credit after sentence is imposed. As we explained in our opening brief (at 27-29), Rule 35(a) and (b) would not permit the recalculation of sentencing credit in many cases in which Section 3585 would mandate correction of the credit award. Similarly, new subsection (c) of Rule 35, effective December 1, 1991, which permits the sentencing court to correct a sentence "imposed as a result of arithmetical, technical, or other clear error" within 7 days after sentencing, would enable the court to recalculate credit in only a small percentage of those cases in which an adjustment would be necessary.

Respondent also implies (Br. 23) that a court could alter a sentence to adjust for post-sentence events under 18 U.S.C. 3582(c), which authorizes the court, on motion of the Director of BOP, to reduce a term of imprisonment once it has been imposed "if it finds that extraordinary and compelling reasons warrant such a reduction." First of all, this section only provides for a reduction in sentence, which would not enable a court to correct for a redundant credit award. In any event, as the Senate Report and the provision itself make clear, the section was enacted to cover a "relatively small number" of "unusual cases" marked by "extraordinary and compelling circumstances," such as "severe illness" or a subsequent amendment of the Sentencing Guidelines "to provide a shorter term of imprisonment" for the same offense. S. Rep. No. 225, *supra*, at 55-56; see also Section 3582(c)(1) and (2). It is unlikely that Congress intended district courts to make routine use of that provision to modify sentencing credit awards without mentioning that purpose as well.

Respondent ultimately concedes, as he must, that some offenders will not receive the credit to which they are entitled because no procedure is available for the court to award credit after sentence is imposed. Br. 23-24. In effect, respondent concludes that achieving "uniformity and certainty" in federal sentencing requires sacrificing compliance with the plain terms of Section 3585. But that tradeoff is unnecessary if Section 3585 is construed to preserve BOP's traditional authority to calculate sentencing credit. Uniformity and consistency in sentencing is possible only if Section 3585 is applied according to its terms: only then will the length of the sentence imposed correspond to the period of imprisonment that the offender actually serves, regardless of the date the federal sentence begins. If BOP makes detention credit calculations, the length of the sentence can readily be conformed to the letter of Section 3585.

2. Respondent notes that, in explaining its decision to abolish the Parole Commission, Congress rejected the argument that the Commission was capable of imposing sentence with greater uniformity and consistency than the district courts. Respondent urges this Court (Br. 11-12, 16-17) to reject the government's argument that BOP can achieve greater uniformity and consistency than the courts in calculating sentencing credit.

Respondent draws a false comparison between the Parole Commission's role in sentencing and BOP's function in calculating sentencing credit. In deciding to abolish the Parole Commission, Congress recognized that the Commission performed essentially the same function as the sentencing court: determining the length of sentence. Like the sentencing court, the Parole Commission exercised "very broad discretion," *Mistretta*, 488 U.S. at 363, in deciding how long an

offender would remain in prison. Under guidelines adopted by the Parole Commission in 1973, the parole decision still remained a complicated inquiry that was "particularly judicial in nature." S. Rep. No. 225, *supra*, at 54; see also *Mistretta*, 488 U.S. at 363-367.

Congress found that the system of dual sentencing, in which the court and the Commission exercised considerable discretion over the ultimate length of sentence, resulted in unpredictable and inconsistent sentences for similarly situated offenders and in disparities between the sentence imposed and the term actually served. *Mistretta*, 488 U.S. at 365; S. Rep. No. 225, *supra*, at 54-55. To remedy those shortcomings, Congress proposed to eliminate the dual sentencing system and consolidate in the courts the authority to "determine[] the actual duration of imprisonment." *Mistretta*, 488 U.S. at 365; S. Rep. No. 225, *supra*, at 46; see *id.* at 52-56.

BOP's role in calculating sentencing credit, in contrast with the Parole Commission's role before sentencing reform, is not redundant of the court's sentencing function, nor has it historically contributed to disparities and uncertainties in sentencing. There is a fundamental difference between imposing sentence—which involves fixing the magnitude of a term of imprisonment—and deciding how much of that sentence an offender has left to serve. Moreover, the calculation of sentencing credit, unlike the core sentencing function that the Parole Commission previously performed, is not "particularly judicial in nature." S. Rep. No. 225, *supra*, at 54. It does not require the weighing of a complicated array of factors, but instead calls for finding particular facts and applying technical rules to those facts.

The comparison respondent seeks to draw between the Parole Commission and BOP is inapt for the additional reason that, in comparing the Parole Commission's performance with its assessment of the district court's ability to carry out the sentencing function, Congress assumed that the courts would be operating within the proposed guidelines system. In contrast, Congress has not explicitly provided for the creation of guidelines to govern the court's calculation of sentencing credit. Thus, the courts have no uniform rules for the administration of the sentencing credit provision. See Gov't Br. 24. BOP, on the other hand, has operated under nationwide guidelines that address the range of circumstances bearing on the calculation of sentencing credit. For this reason, BOP is far more likely to perform the task of awarding credit in a consistent and uniform manner than the district courts.[4]

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[4] Respondent suggests that the court can give "appropriate consideration" to BOP guidelines regarding jail credit. Br. 21. If respondent means to say that the credit award decision should be made in accordance with BOP guidelines, it makes little sense to have the courts, rather than BOP, apply those guidelines. Indeed, if BOP is held not to have any statutory responsibility for making credit determinations, it is not clear why it would be within BOP's authority to promulgate such guidelines any more than it would be within the authority, for example, of the Executive Office of United States Attorneys. Although BOP has published an abbreviated set of interim rules under Section 3585 to replace the comprehensive guidelines developed under the predecessor provision, 18 U.S.C. 3568 (1982), see Gov't Br. App. 15a-18a, and is in the process of developing a more elaborate set of rules, it has not yet issued permanent guidelines under Section 3585. BOP would have no reason to do so if it lacks authority over sentencing credit awards.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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No. 90-1745

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD WILSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Section 3585(b) of Title 18, U.S.C., provides that a defendant shall be given credit toward the service of a term of imprisonment for any period he has spent in official detention before beginning his sentence. Credit is awarded if the detention is attributable to the offense of conviction or to any other offense for which the defendant was arrested after committing the offense of conviction, as long as the period of detention has not been credited against another sentence.

The question presented in this case is whether the computation of credit is to be made by the district court at the time of sentencing or by the Attorney General after the defendant begins to serve his federal sentence.

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 916 F.2d 1115.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 1990. A petition for rehearing was denied on February 11, 1991. Pet. App. 9a. The petition for a writ of certiorari was filed on May 13, 1991 (a Monday), and was granted on October 7, 1991. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 3585(b) of Title 18, U.S.C., provides:

> (b) Credit for Prior Custody.—A defendant shall be given credit toward the service of a term

of imprisonment for any time he has spent in official detention prior to the date the sentence commences—

> (1) as a result of the offense for which the sentence was imposed; or
>
> (2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;

that has not been credited against another sentence.

STATEMENT

1. In August 1988, respondent participated with two co-defendants in an abortive attempt to obtain money from the Bank of Putnam County in Cookeville, Tennessee, by making threats to the chief executive officer of the bank. Respondent and his co-defendants also threatened harm to the families of four high school students in an attempt to induce the students to help them carry out the scheme. Two of the students foiled the plot by reporting it to the authorities. Pet. App. 2a.

On October 5, 1988, respondent was arrested by state officials in connection with several robberies. On December 15, 1988, while respondent was in state custody, he was indicted in federal court for violating the Hobbs Act, 18 U.S.C. 1951(a), based on his involvement in the Bank of Putnam County incident, and an arrest warrant was issued. The next day, a federal detainer was filed against respondent with state prison authorities. Although the federal arrest warrant was signed and returned by the United States Marshal's Office on May 17, 1989, respondent remained in the custody of the Putnam County sheriff

pending disposition of the state charges against him. Pet. App. 2a-3a.

On November 29, 1989, respondent pleaded guilty to the federal charge and was sentenced on that charge to 8 years' imprisonment. At the time of sentencing, the district court orally denied respondent's request that he be given credit against his federal sentence for the time he served in state custody prior to the time his federal sentence was imposed. Pet. App. 3a. Shortly thereafter, in early December, respondent was sentenced on the state charges for which he had been detained. The state court imposed a total of 15 years' imprisonment on the state charges, and directed that the state sentence would be served concurrently with the federal sentence. See Gov't C.A. Br. Addendum A-C. The state court awarded respondent credit against his state sentence for the 429-day period he had been in state custody prior to sentencing, between October 5, 1988, and December 7, 1989. Gov't C.A. Br. Addendum C-1.[1]

2. The court of appeals held that the district court should have granted respondent credit against his federal sentence for the period he spent in state custody. The court first held that under 18 U.S.C. 3585(b), unlike its immediate predecessor, 18 U.S.C. 3568 (1982), it is the district court, not the Attorney General, that must award credit for time spent in

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[1] Respondent was sentenced for three separate state felonies to a 10-year term and a 5-year term of imprisonment, to run consecutively, and a 2-year term of imprisonment, to run concurrently with the 10-year term. The 2-year and 10-year terms were set to run concurrently with the 8-year federal term of imprisonment imposed in the instant case. See Gov't C.A. Br. Addendum A-C. The 429 days of credit for prior custody was awarded against respondent's 10-year sentence. Gov't C.A. Br. Addendum C-1.

official detention. The court acknowledged that its ruling on that point was at odds with the Eleventh Circuit's decision in *United States* v. *Lucas*, 898 F.2d 1554 (1990), in which the court held that the Attorney General has exclusive authority under Section 3585(b) to award credit against a federal sentence. Pet. App. 6a & n.2.

The court of appeals further held that a district court must give credit for a period of state detention as long as that period of detention "has not been credited to some other sentence, state or federal, *at the time sentence is imposed*." Pet. App. 8a (emphasis added). On remand from the court of appeals, in an Order dated March 29, 1991, the district court awarded respondent 13 months and 20 days of credit toward his federal sentence of 8 years for time served in state custody from October 8, 1988, to November 28, 1989.[2] See App., *infra*, 1a. As a consequence of that ruling, respondent in effect received double credit for the time he served in state detention.[3]

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[2] Respondent was received into federal custody and began to serve his state and federal sentences on December 12, 1989. The district court awarded credit for the period in state custody only through the date of sentencing on November 28, because BOP had already awarded respondent credit for the period between the date that his federal sentence was imposed and the date that he arrived at the federal penitentiary, when his federal sentence officially began to run. During that period, respondent was in federal custody on a writ of habeas corpus ad prosequendum from state custody.

[3] The fact that respondent is serving his state and federal sentences concurrently reduces the likelihood that the double credit for his detention time will result in a double reduction of his period of confinement. Nonetheless, he stands to benefit from the double credit by receiving an accelerated parole date from the state system, an accelerated final release date from the state system, and an accelerated release date from the federal system. Even if the service of his full federal sentence (less the credit for detention time) would render the acceleration of his state parole date less significant (since he would be "paroled" to the federal system, where he is already serving his federal sentence), he could still benefit from the double award of credit, if, for example, his state parole is revoked after his release from federal custody, and he is required to serve the remaining term of his state sentence (less the period of credit for detention time). And even if his parole is not revoked, his total period of parole on the state charges will be reduced by the detention credit awarded against the state sentence.

SUMMARY OF ARGUMENT

Before 1987, defendants had a statutory right to credit for time spent in custody prior to sentencing under certain circumstances, and the statute granting that right assigned the task of calculating and awarding credit to the Attorney General. Under that regime, the court would impose sentence and the Bureau of Prisons would calculate the amount of credit due to the defendant for prior periods of custody relating to the offense. In 1984, Congress revised the custody credit provision, enlarging slightly the class of cases in which awards of credit for prior custody would be granted. The new version of the statute, 18 U.S.C. 3585(b), which became effective in November 1987, provided that the defendant "shall be given credit toward the service of a term of imprisonment for any time spent in official detention prior to the date the sentence commences." Unlike the prior version of the statute, however, Section 3585(b) did not indicate which entity—the Attorney General or the district court—would make the credit award.

We agree with the Seventh, Tenth, and Eleventh Circuits that when Congress enacted Section 3585(b), it did not intend to shift responsibility for awarding presentence detention credit from the Attorney General to the courts. The language of Section 3585(b) supports that view in several respects. First, the statute refers to awarding credit for an offense "for which the sentence *was* imposed," which suggests that the award of credit was not intended to be part of the sentencing process. Second, detention credit was intended to include the entire period of custody "prior to the date the sentence commences." 18 U.S.C. 3585(b). Yet because a federal sentence commences only at the time the defendant is transported to or arrives at his designated detention facility, see 18 U.S.C. 3585(a), a sentencing court will often not be certain when the sentence will formally commence and thus not be in a position to calculate the precise amount of the presentence detention credit. Third, the statute's prohibition against "double counting," *i.e.*, giving credit for "jail time" that is credited to another sentence, would be undermined if the credit award were made part of the defendant's sentence, rather than being left for administrative determination. Because other jurisdictions may award the defendant "jail time" credit after the date of his federal sentence, the defendant would receive an unjustified windfall of double credit if his credit award had to be made by the court at the time of sentencing.

While it is true that Congress in 1984 omitted the reference to the Attorney General in the credit award statute, the omission does not ~~in~~dicate that Congress meant to make a change in the law in that respect. Congress did not replace the reference to the At-

torney General with a reference to the court, either explicit or implied. Nor is there any indication in any of the legislative materials that Congress intended to shift responsibility for making credit awards from the Attorney General to the district courts. A more plausible inference is that Congress regarded the Attorney General's role in awarding credit to be such a familiar and uncontroversial feature of the statutory procedure that it neglected to state explicitly that the Attorney General would continue to play the same role under the revised statute.

The practical difficulties that a court would face in making awards for presentence detention are such that if Congress intended to make the award part of the sentencing process, it is likely that it would have made the point explicitly in the new statute. One of the principal purposes of the Sentencing Reform Act of 1984 was to render criminal sentences more uniform by subjecting them to a nationwide system of guidelines. To shift responsibility for credit awards from the Attorney General, who applied a uniform set of guidelines for calculating and granting credit awards, to district courts, which would not have a broad national perspective nor be governed by a comprehensive regulatory scheme, would be likely to introduce inconsistencies in the way presentence credit is awarded. Moreover, because the calculation of credit awards turns on facts regarding proceedings in other jurisdictions that are not always readily available to a sentencing court, it is far more efficient to leave the task of calculating presentence credit to an administrative body. An administrative body like the Bureau of Prisons can gather facts through informal inquiry rather than formal proceedings, and it can promptly adjust credit awards when circumstances change, without the need for the initiation of

new judicial proceedings. And if the prisoner is not satisfied that the Attorney General has properly calculated his credit award, the prisoner may seek judicial review, as under the pre-1984 statute, after he has exhausted his administrative remedies within the Bureau of Prisons.

ARGUMENT

THE ATTORNEY GENERAL, NOT THE SENTENCING COURT, IS RESPONSIBLE FOR AWARDING CREDIT AGAINST A SENTENCE FOR A PERIOD IN OFFICIAL DETENTION

A. The 1984 Amendment To The Detention Credit Statute Did Not Transfer Authority To Compute Sentencing Credit From The Attorney General To The District Court

1. Prior to 1960, the question whether to grant credit for time spent in custody before sentencing was left to the sentencing court's discretion. The presumption was that, in imposing sentence, the sentencing judge would take the amount of time in custody into consideration. See Federal Prison System Program Statement No. 5880.24, at 1 (Sept. 5, 1979) [hereinafter *FPS Program Statement*] (reviewing the history of sentencing credit provisions and practice);[4] *Aldridge* v. *United States*, 405 F.2d 831, 832 (9th Cir. 1969). Because judges considered themselves barred from reducing sentences below a mandatory minimum to take account of previous custody, Section 3568 was amended in 1960 to direct the Attorney General to grant credit for pretrial detention in cases in which prisoners were serving man-

[4] The FPS Program Statement is attached as an appendix to this brief.

datory minimum sentences. Act of Sept. 2, 1960, Pub. L. No. 86-691, § 1(a), 74 Stat. 738; see H.R. Rep. No. 2058, 86th Cong., 2d Sess. 2 (1960). Judicial decisions later required the Attorney General to extend credit under that statute to defendants who received maximum statutory sentences, as it was clear that in those cases the sentencing court could not have granted credit for previous jail time in imposing sentence. See *FPS Program Statement* at 1, App., *infra*, 3a-4a.

2. In response to complaints that judges were often inconsistent in awarding credit for previous custody, Congress amended Section 3568 in 1966 to "guarantee[] credit for pretrial custody against service of sentences imposed upon conviction of any offense against the United States * * * without regard to whether the statute requires the imposition of a minimum mandatory sentence." S. Rep. No. 750, 89th Cong., 1st Sess. 21 (1965). In the interest of achieving greater uniformity in the determination of sentencing credit, Congress also decided to assign the task of granting credit exclusively to the Attorney General. As amended in 1966, Section 3568 provided that "[t]he Attorney General shall give [the defendant] credit toward service of his sentence for any days spent in custody in connection with the offenses or acts for which sentence was imposed." See H.R. Rep. No. 1541, 89th Cong., 2d Sess. 4 (1966) ("Upon imposition of sentence, the convicted defendant is turned over to the custody of the Attorney General and, therefore, from the administrative standpoint the Attorney General should be the individual who would give credit to the convicted defendant.").

Under the 1966 statute, the task of computing and assigning credit to federal prisoners for presentence

periods of detention was assigned to the Bureau of Prisons (BOP), as the Attorney General's designee, see 28 C.F.R. 0.96. BOP made credit determinations for each prisoner according to uniform, nationwide guidelines. See *United States* v. *Lucas*, 898 F.2d 1554, 1556 (11th Cir. 1990). The computation process took place after the defendant was sentenced and transferred to the custody of the Attorney General; although BOP's credit award decision was subject to judicial review, the sentencing court had no direct role in making the computation and award of credit. See, *e.g.*, *United States* v. *Bayless*, 940 F.2d 300, 304-305 (8th Cir. 1991) (under Section 3568, "the issue of whether [a prisoner] should be credited for the time that he spent in pre-sentence custody is, in the first instance, an issue for the Attorney General"); *United States* v. *Flanagan*, 868 F.2d 1544, 1546 (11th Cir. 1989) (prisoner's claim that his pre-sentence custody should have been credited against his sentence was not properly before the court because of failure to exhaust administrative remedies); *United States* v. *Martinez*, 837 F.2d 861, 865 (9th Cir. 1988); *United States* v. *Morgan*, 425 F.2d 1388, 1389-1390 (5th Cir. 1970); see also H.R. Rep. No. 1541, 89th Cong., 2d Sess. 4 (1966).

3. In the Sentencing Reform Act of 1984, Congress revised Section 3568 and recodified it as Section 3585(b). The amended version of the statute provided that "[a] defendant shall be given credit" toward his term of imprisonment for any period of "official detention" for which the defendant was arrested after committing the offense for which he was being sentenced.[5] Unlike its predecessor, Section

[5] The new provision, which became effective in November 1987, replaced the term "custody" with the more precise term

3585(b) was silent regarding who was to make the credit determination. Pointing to the omission in Section 3585(b) of language referring to the Attorney General, the court of appeals in this case held that the new statute was meant to transfer to the sentencing court the responsibility for computing and awarding credit for presentence detention, even though the courts are nowhere mentioned in the statute.[6] That

"official detention," and expressly limited the award of credit to time that "has not been credited against another sentence." In addition, the statute authorized credit not only for time served "in connection with the offense or acts for which sentence was imposed," see Section 3568, but also for any period of detention that was "a result of any other charge" for which the defendant was arrested after the commission of the offense for which the sentence was imposed. This language expanded the circumstances under which credit was available for prior state custody. Compare *FPS Program Statement*, at 1-5, App., *infra*, 4a, 6a, 8a-13a (credit under Section 3568 was granted only for non-federal custody "in connection with" the federal offense) with Federal Bureau of Prisons Operations Memorandum No. EMS OM 154-89 (Oct. 23, 1989) [hereinafter *October 1989 Operations Memorandum*] (credit for non-federal custody under Section 3585 is granted regardless of connection to federal offense). See also *United States* v. *Richardson*, 901 F.2d 867, 870 (10th Cir. 1990) (granting credit for prior state custody under Section 3585). The October 1989 Operations Memorandum is attached as an appendix to this brief. See App., *infra*, 15a-18a.

[6] The First Circuit has taken the same position. See *United States* v. *Benefield*, 942 F.2d 60, 66-67 & n.7 (1991) (Section 3585 confers exclusive authority on the district court to assign sentencing credit). Two courts of appeals have held that the Attorney General and the district court have concurrent authority under that provision, see *United States* v. *Beston*, 936 F.2d 361, 363 (8th Cir. 1991); *United States* v. *Chalker*, 915 F.2d 1254, 1256-1258 (9th Cir. 1990), and three others have held that the Attorney General continues to exercise exclusive authority, as delegated to BOP, to assign sentencing credit

holding is contrary to the language and purposes of Section 3585(b), which indicate that the credit determination is not to be made by the district court at sentencing, but by BOP at some point after the defendant begins to serve his sentence.

4. Section 3585(b) does not expressly assign the task of computing and awarding sentencing credit for previous detention. The statute thus fails to answer in express terms the question whether the Attorney General or the sentencing court is to exercise that function. Nonetheless, the statutory language provides strong indications that the Attorney General is to continue to make credit determinations and awards; it does not support the inference drawn by the court of appeals in this case—that Congress intended to relieve the Attorney General of authority to award credit for time served, and to transfer that authority to the courts. In particular, the statutory language that governs the timing of the credit award and the manner in which the amount of credit is to be calculated supports the view that Congress intended BOP—the agency to which the Attorney General has delegated this responsibility—to retain that authority.

a. Section 3585(b)(1) provides that defendants must be awarded credit for time spent in official detention as a result of the offense "for which the sentence *was* imposed" (emphasis added). Likewise, Section 3585(b)(2) mandates credit for time spent in official detention as a result of any other charge for which the defendant was arrested after the commission of the offense "for which the sentence *was* imposed" (emphasis added). In this respect, Section 3585(b) is identical to its predecessor, Section 3568, which also required that credit be awarded in connection with the offense "for which sentence *was* imposed" (emphasis added). Under Section 3568, the time-served credit determination was made by BOP *after* sentencing. The use of the past tense in Section 3585(b) likewise indicates that the award of credit should be made *after*, rather than at the same time as, the imposition of sentence. Compare 18 U.S.C. 3663 ("the court, *when sentencing a defendant* * * *, may order * * * that the defendant make restitution") (emphasis added). Thus, the statutory language governing the timing of the credit determination indicates that Congress intended to carry forward the pre-existing administrative practice, under which credit was granted by BOP when the defendant arrived at prison to serve his sentence, rather than by the courts at the time of sentencing.

b. Section 3585(b) also states that credit must be awarded for time spent in official detention "prior to the date the sentence commences." Section 3585(a) provides that a sentence commences not on the date of sentencing, but "on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served." The district court often will be unable to determine at sentencing how much time the defendant will have served in official detention for which he is eligible to receive credit by the time he begins to serve his federal sentence.

The point is illustrated by this case, where a period of two weeks elapsed between respondent's federal

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under Section 3585. See *United States* v. *Brumbaugh*, 909 F.2d 289, 290-291 (7th Cir. 1990); *United States* v. *Lucas*, 898 F.2d at 1555-1556; *United States* v. *Woods*, 888 F.2d 653, 654 (10th Cir. 1989), cert. denied, 494 U.S. 1006 (1990).

sentencing and the date on which he began serving his state and federal sentences.[7] BOP, by contrast, need not speculate about the amount of credit to which a defendant is entitled on the date he commences to serve his sentence. As the federal agency responsible for receiving new prisoners, BOP can make that calculation when the defendant begins serving his term. Since BOP, and not the district court, is in the position to carry out the statutory requirement that a defendant receive credit for time served up to the date he commences serving his sentence, it makes sense to read the statute to preserve BOP's role in making the credit determination.

c. The court of appeals' conclusion that district courts are authorized to award credit for post-offense detention under Section 3585(b) is also incompatible with the statute's explicit prohibition against "double counting"—that is, the award of credit for a period of detention that is credited against another sentence. As this case illustrates, a defendant may be eligible to receive credit for the same period of detention against both his state and federal sentences. If a district court imposes sentence before a defendant is sentenced on state charges, the court will not be in a position at sentencing to know what the state court will do. Thus, the federal court may end up shortening the defendant's sentence to take account of the same period of detention for which he subsequently receives credit from the State. This is more than a theoretical possibility, since many States either do not prohibit multiple credits at all or bar them only with respect to consecutive sentences. See, *e.g.*, *People*

[7] BOP awarded respondent credit for this period when he arrived at federal prison. See note 2, *infra*. Under the court of appeals' ruling in this case, BOP would lack authority to do so.

v. *Schuler*, 76 Cal. App. 3d 324, 330 & n.10, 142 Cal. Rptr. 798, 802 & n.10 (1977); *Massey* v. *People*, 736 P.2d 19, 21 (Colo. 1987).[8] Moreover, even in States that expressly prohibit multiple credits for consecutive sentences, a state court that is unaware of a previous award of credit against a federal sentence may inadvertently make a duplicative award of credit.

The likelihood that double credit will be awarded as a result of granting detention credit as part of the sentencing process flies in the face of the statutory command that credit be given only for a period of detention "that has not been credited against another sentence." The court of appeals read the statutory ban on double counting as if it prohibited double counting only so long as the detention has not been

[8] Although normally a grant of credit against a state sentence will result in the denial of credit against a federal sentence, BOP grants credit against a federal sentence when "the state orders [its] sentence to run concurrently with the federal sentence, and the state sentence will be absorbed [in the federal sentence] prior to grant of good time, resulting in no benefit from the state jail time." See *October 1989 Operations Memorandum*, at 2, App., *infra*, 17a-18a; see also Federal BOP Operations Memorandum No. 157-90 (Oct. 10, 1990) (extending effective date of October 1989 Operations Memorandum to October 31, 1991). The First Circuit has recently adopted a similar rule in construing Section 3585(b). See *United States* v. *Benefield*, 942 F.2d at 67 ("credit granted by the state court was rendered meaningless when not similarly reflected in [defendant's] concurrent federal sentence").

Although respondent's 10-year state sentence against which custody credit was awarded was made concurrent with the 8-year federal sentence at issue here, he would not be entitled to credit against his federal sentence under the BOP guidelines, because his total state sentence will not "be absorbed [in his federal sentence] prior to the grant of good time."

credited against another sentence "at the time federal sentence is imposed." Pet. App. 8a. The court was forced to adopt that proviso because the result of assigning responsibility for the credit decision to the sentencing court is that the same period of detention might count twice if, as in this case, credit is awarded against a state sentence after the federal sentence is imposed. The proviso added by the court of appeals, however, has no grounding whatever in the language of the statute, and there is no sound reason why some defendants should receive the windfall of double credit for a single period of detention simply because of a fortuity of timing.

The anomaly produced by the court of appeals' ruling can be avoided, and the double counting ban applied with consistency, if the award of credit is treated as an administrative task that is performed after the defendant begins to serve his federal sentence, allowing adjustments to be made during the service of the sentence. In the course of a defendant's service of his federal sentence, it will ordinarily become clear whether the defendant has received credit on other sentences for periods of detention that would bar a second award of credit under Section 3585(b). If the credit determination is an administrative task, rather than part of the sentencing function, the defendant's sentence can be modified during his period of incarceration to account for later awards of credit on other sentences imposed after the federal sentence. Here, if the court of appeals had held that the credit determination was for BOP to make, BOP could simply have noted the award of credit on respondent's state sentence and refused to credit the period of state detention against his federal sentence. But such adjustments cannot easily be made if the credit determination is one for the sentencing court to make as part of the imposition of the federal sentence.

5. Respondent relies heavily on the canon of statutory construction holding that where "the words of a later statute differ from those of a previous one on the same or a related subject, the legislature must have intended them to have a different meaning." Br. in Opp. 7, quoting *Klein* v. *Republic Steel Corp.*, 435 F.2d 762, 765-766 (3d Cir. 1970). He argues that under that principle the deletion of the reference to the Attorney General in Section 3585(b) necessarily reflects Congress's intent to withdraw the Attorney General's authority to make credit determinations, and to transfer that function to some other entity.

Contrary to respondent's suggestion, not every change Congress enacts alters the operation of a statute.[9] As this Court has repeatedly stated, a change of statutory language is only "some evidence of a change of purpose." *McElroy* v. *United States*, 455 U.S. 642, 651 n.14 (1982). "[T]he inference of a change of intent is only 'a workable rule of construction, not an infallible guide to legislative intent, and cannot overcome more persuasive evidence.'" *Ibid.*, quoting *United States* v. *Dickerson*, 310 U.S. 554, 561 (1940). See also *Kelly* v. *Wauconda Park Dist.*, 801 F.2d 269, 272 (7th Cir. 1986) ("Just because the language of a subsequent statute is not

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[9] For example, the current bail jumping statute, 18 U.S.C. 3146, requires that the defendant "knowingly" fail to appear. The previous bail jumping statute, former 18 U.S.C. 3150 (1982), required that the defendant "willfully" fail to appear. The Senate Report indicates that in making the change Congress "intend[ed] to perpetuate the concept of 'willfully' which appears in the current bail jumping statute." S. Rep. No. 225, 98th Cong., 1st Sess. 31 (1983).

identical to the earlier statute on which it was modeled, we do not necessarily assume that Congress intended to change the meaning") (citing *McElroy* v. *United States*, *supra*), cert. denied, 480 U.S. 940 (1987).

More fundamentally, canons of construction are only aids to guide the interpretive inquiry; they are not substitutes for careful analysis aimed at discerning Congress's intent. In the case of Section 3585(b), the rule of statutory construction invoked by respondent is especially unhelpful. When Congress deleted the reference to the Attorney General in Section 3585(b), it failed to replace the reference with another subject.[10] By not designating another entity to exercise the sentence adjustment power, Congress left a textual gap. It thus falls to the judiciary to divine the meaning of this imperfect result of Congress's rather inelegant craftsmanship. See *United States* v. *Brumbaugh*, 909 F.2d at 291 ("The use of the passive voice in the statutory language requires [the courts] to infer a subject."). The Court must now determine whether Congress, in creating a gap in the statutory language, meant to bring about a very significant substantive change in prior procedures.

Where, as here, the amended statute says nothing about the matter in question, a change in statutory

[10] In *Klein*, by contrast, the change introduced into the statute specifically addressed the key point at issue, which was whether the violation of a ban on dangerous mining practices required a showing of negligence. The revised statute added the words "in such a negligent manner" to the clause describing the forbidden conduct. To construe the statute as not requiring a showing of negligence would have flown in the face of the explicit terms of the statute. 435 F.2d at 765-766.

language "cannot be read in some sort of interpretive vacuum." *Martin* v. *Luther*, 689 F.2d 109, 117 (7th Cir. 1982). In the face of such ambiguity, and against the background of a longstanding and "consistently applied" practice under the statute, "a court should not infer a congressional intent to depart from precedent in the absence of some clear indication that it made a decision to do so." *Sea-Land Service, Inc.* v. *United States*, 874 F.2d 169, 172-173 (3d Cir. 1989). That indication is nowhere to be found in the text, structure, or background of the statute.

In light of the Attorney General's longstanding responsibility for calculating and awarding detention credit, it is unlikely that Congress would have shifted responsibility for awarding detention credit to the courts without doing so explicitly. Yet there is nothing in Section 3585 to indicate that Congress intended to change the entity responsible for sentencing credit; indeed, as explained above, the language of the statute points to the opposite conclusion. It is even less plausible to infer that Congress meant to transfer authority in this area to the courts in light of Congress's decision to make the district court's role in other sentencing matters plain by repeatedly including the phrase "the court shall" or "the court may" in statutory provisions closely related to the one at issue here. See 18 U.S.C. 3582(a), (c) and (d) (court's authority to impose a sentence of imprisonment); 18 U.S.C. 3583(a) and (c)-(g) (court's authority to impose term of supervised release following imprisonment); 18 U.S.C. 3584(a) and (b) (court's authority to impose concurrent or consecutive sentences). If Section 3585(b) was intended to depart from prior law by assigning to sentencing courts the responsibility for awarding credit, Congress surely

would have drafted it with the same specificity evident in those other sections.

The legislative history is likewise completely silent on what entity is to award credit for time served. The Senate Report summarizes the predecessor statute without so much as mentioning the delegation of authority to the Attorney General, and the discussion of Section 3585(b) does not even allude to the omission of an express delegation, let alone indicate any intention to shift responsibility to the district court. See S. Rep. No. 225, 98th Cong., 1st Sess. 128-129 (1983). As this Court has noted in a similar context, "[t]his silence is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely. * * * At the very least, one would expect some hint of a purpose to work such a change, but there [is] none." *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979). The omission of any reference to "working a change" in this context is even more telling in light of the comments in the Senate Report on each of the other substantive changes from the predecessor statute that were made in Section 3585.[11]

[11] First, the Report discusses the difference between the two statutes regarding the date when sentence commences. S. Rep. No. 225, *supra*, at 129. Second, the Report points out that, while the predecessor statute authorized credit only for time spent in custody "in connection with the offense or acts for which the sentence was imposed," *id.* at 128, Section 3585(b) also authorizes credit for time spent in custody as "a result of a separate charge for which [the defendant] was arrested after the commission of the current offense." S. Rep. No. 225, *supra*, at 129. Finally, the Senate Report makes explicit reference to Section 3585(b)'s ban on double counting —a provision missing from the predecessor statute. Throughout its discussion of the entire Comprehensive Crime Control Act of 1984, the Senate Report is scrupulous in identifying the substantive changes, as opposed to merely stylistic ones, that the Act made in prior law.

As the Seventh Circuit observed in *United States* v. *Brumbaugh*, 909 F.2d at 291, "[c]ertainly, if Congress had decided to make such a significant change in the allocation of responsibility in the sentencing function, the legislative history—comprehensive on so many other areas of criminal law reform—would reflect that policy choice."

Given the unprecedented nature of shared jurisdiction in the area of sentencing credit, it is even more unlikely that Congress would have silently revised the statute to grant concurrent authority to the Attorney General and the sentencing court, as some courts of appeals have held (see note 6, *supra*). Yet neither the statute nor the legislative history contains even the remotest suggestion that Congress contemplated a system of shared responsibility or any hint as to how such a system would work. See pp. 24-25, *infra*. Indeed, since the court's ~~exercise of~~ authority in a concurrent scheme would necessarily be exercised at the time of sentencing, concurrent jurisdiction is also inconsistent with the statutory language, discussed above, indicating that the credit determination is to be made at some point after the defendant has begun to serve his sentence. In the absence of any affirmative indication of an intent to reallocate authority in this manner, it must be concluded that Congress did not work a change in this aspect of the sentencing credit provision.

6. Respondent points to the placement of Section 3585 in Chapter 227 of Title 18, entitled "Sentences," instead of in Chapter 229, entitled "Postsentence Administration." See Br. in Opp. 7. He argues that if

Congress had intended to give the Attorney General authority to award credit after sentencing, it would have placed the provision in the latter chapter. *Ibid.*

The placement of Section 3585(b) in Chapter 227, rather than in the chapter entitled "Postsentence Administration," does not have the significance that respondent suggests. The predecessor of Section 3585(b), former Section 3568, which explicitly assigned responsibility for detention credit awards to the Attorney General, was not found in the chapter entitled "Postsentence Administration," but was located in a chapter entitled "Sentence, Judgment, and Execution," which also contained some provisions governing the imposition of sentence by the court. See 18 U.S.C. 3575 (1982) (sentencing of dangerous special offenders); 18 U.S.C. 3577 (1982) (use of information for sentencing); 18 U.S.C. 3579 (1982) (order of restitution at sentencing).

More significantly, Section 3585(a), which defines the commencement of the defendant's sentence, immediately precedes the subsection at issue in this case and is, of course, also found in Chapter 227. Yet Section 3585(a) is obviously directed to BOP, rather than the court, since it is BOP's task to calculate the inmate's release date, and it is therefore BOP that must take into account the starting date for the sentence. The location of Section 3585(b) in Chapter 227 therefore provides no support for respondent's contention that awarding credit for pretrial detention is a judicial function, and in fact the grouping of Section 3585(b) with the administrative provision in Section 3585(a) suggests just the opposite.

B. BOP Is Best Equipped To Assign Sentencing Credit In A Manner Consistent With The Objectives Of The Sentencing Reform Act

1. In enacting the Sentencing Reform Act, of which Section 3585(b) is a part, Congress was concerned primarily with the "great variation among sentences imposed by different judges upon similarly situated offenders." *Mistretta* v. *United States*, 488 U.S. 361, 366 (1989). Congress created the Sentencing Commission to devise a system of uniform sentencing guidelines that would bring greater regularity and uniformity to sentencing by "reducing sentencing disparities." *Id.* at 367.

In the case of detention credit awards, that objective was well served by the pre-existing statutory regime, under which BOP awarded and calculated credit for time served according to uniform national guidelines. As the administrative agency in charge of computing sentencing credit for 25 years, BOP developed a considered body of guidelines and procedures for administering the custody credit provisions. Those rules guaranteed a consistent approach nationwide to individual variations in defendants' situations that recur with some frequency. See *FPS Program Statement*, App., *infra*, 3a-14a (administrative guidelines promulgated under Section 3568); *October 1989 Operations Memorandum*, App., *infra*, 15a-18a (interim guidelines under Section 3585). For example, rules promulgated by the agency under Section 3568 addressed credit for time spent in a residential community center, on probation, on a writ of habeas corpus from non-federal custody, or in detention pending federal prosecution while simultaneously serving another sentence. App., *infra*, 6a-13a. Recent BOP guidelines also give guidance on the administration of the "double credit" bar in Section 3585, by

addressing cases in which, for example, the state sentence against which credit has already been awarded is vacated, state probation is granted, or the state charges are dismissed. App., *infra*, 17a.

If the task of computing sentencing credit is taken over by the courts, judges will be forced repeatedly to confront the range of circumstances that have already been addressed administratively by the agency with expertise in this area. In contrast with a system administered by BOP, one administered by the courts, which are not bound by BOP guidelines, inevitably will result in disparate credit awards for similarly situated defendants. To be sure, conflicts that develop among the district courts in awarding detention credit might gradually abate over time through the appellate process. Nevertheless, the process of judicial application of the statute on a case-by-case basis is likely to be far more cumbersome—and produce less uniformity in the end—than a system of administrative determinations governed by uniform rules and subject to subsequent judicial review.

Congress's principal reason for giving the Attorney General exclusive authority over sentencing credit in the 1966 statute was to eliminate the unfairness and disparities in credit awarded by courts at sentencing. There is no indication that Congress was dissatisfied with the system it created in 1966, or with BOP's handling of detention credit determinations under the predecessor statute. It is therefore hard to believe that, as part of legislation designed to bring regularity and uniformity to sentencing through the use of uniform guidelines, Congress abandoned a scheme that achieves that objective and resurrected an old regime that undermines it.

Interpreting Section 3585 to confer concurrent jurisdiction over sentencing credit to the courts and

BOP would also disserve Congress's objective of facilitating uniform and predictable sentencing procedures. The absence of statutory guidance on how a system of concurrent jurisdiction would work would inevitably lead to jurisdictional squabbles between the Executive and Judicial Branches, with the possibility of different resolutions of such questions in different jurisdictions. For example, once the district court awarded or declined to award credit, it is not clear whether BOP would have authority to alter the court's determination other than by making adjustments in the court's credit calculations based on factors occurring after sentencing. In any case, given the frequency with which postsentence adjustments would have to be made, the court's calculation of sentencing credit would only be tentative. It is difficult to fathom why Congress would choose to provide for two separate credit determinations—one preliminary and one final—with no clear indication of the discrete role each decisionmaking body should play.

2. BOP's administration of the sentencing credit function serves the goals of uniformity and fairness for other reasons as well: BOP is in a far better position than the courts to make a single, accurate calculation of the detention credit, to correct any errors in its determination, and to modify credit awards for changed circumstances.

a. An administrative agency with fact-finding authority and expertise in sentencing practice is far more likely than a sentencing judge to make an accurate and consistent calculation of the sentencing credit due a defendant. That calculation cannot be made without accurate information concerning the dates and precise circumstances of the prior detention for which the defendant seeks credit. BOP has the abil-

ity to communicate informally and directly with state and federal prison and law enforcement authorities to obtain and verify such information. In addition, eligibility for credit under Section 3585(b) depends on a number of other factors, including the circumstances of the previous presentence detention (*e.g.*, whether the defendant was serving another sentence at the time, and the type of facility in which he was detained), the timing of the arrest that resulted in the presentence custody, and whether, and under what circumstances, the same period of custody has been credited against another sentence. See, *e.g.*, App. B and C, *infra*.

BOP has developed and implemented established procedures for gathering the information necessary to make the credit determination. See *FPS Program Statement*, at 6, App., *infra*, 13a-14a (describing procedures for obtaining documentation "[w]hen there is cause to believe that credit may be due" or "any inconsistencies in the manner in which the factual situation presents itself"). A sentencing court, in contrast, has no independent fact-finding authority; it must depend on evidence the parties offer. In addition, unlike the agency—which can operate swiftly and informally—the court is restricted to fact-finding through formal proceedings. See, *e.g.*, *O'Connor* v. *Attorney General*, 470 F.2d 732, 734 (5th Cir. 1972) (noting that the requirement of exhaustion of "internal [BOP] administrative procedure[s]" is designed to "facilitate * * * proper credit being given to federal prisoners," and that such determinations "present procedural difficulties" for courts because those "having knowledge of the facts surrounding state detention and the failure to make bail are usually far removed from the federal courts").

b. BOP also has more flexibility to adjust a credit award for changed circumstances or errors in sentencing credit. And because BOP will be making credit determinations later in the process than the sentencing court, there will be fewer occasions on which the agency will be required to make modifications in the credit calculation in light of subsequent developments in other jurisdictions.

As discussed above, see pp. 13-14, the detention credit assigned by the district court at sentencing will fail to reflect post-sentencing events that determine the actual credit due under the statute, such as a subsequent award of credit against a state sentence for the same detention, the defendant's continued detention during the interim before commencing his sentence, or the imposition of a new period of detention (*e.g.*, by revocation of bail pending appeal) before the defendant begins to serve his sentence. There is no ready mechanism for bringing defendants before the court to make post sentence adjustments, and Congress's failure to provide one at the time it enacted Section 3585 is further evidence that it did not intend to transfer the sentencing credit function to the courts.

Prior to November 1, 1987, Fed. R. Crim. P. 35(a) authorized district courts to correct an illegal sentence at any time. But in the Sentencing Reform Act of 1984 (the same legislation that enacted Section 3585), Congress amended Rule 35 to authorize the district courts to revise a sentence only by correcting it on remand from the court of appeals, or on a government motion based on the defendant's substantial assistance in an investigation or prosecution. See *United States* v. *Cook*, 890 F.2d 672, 674 (4th Cir. 1989). To be sure, it has been held that a district

court still retains inherent authority "to correct its own obvious errors in sentencing" within the 30 days allowed for a government appeal from a sentence under 18 U.S.C. 3742. See Fed. R. App. P. 4(b). See also *United States* v. *Uccio*, 917 F.2d 80, 84 (2d Cir. 1990); *Cook*, 890 F.2d at 675. But even assuming that exception would apply here, there would still be no way to correct the sentence when a second award of credit is made after the expiration of the 30-day period, which may sometimes happen. Nor does a defendant have any recourse when his post-sentencing detention extends beyond or begins after the thirtieth day following sentencing. Defendants (but not the government) can make a motion to correct their sentence under 28 U.S.C. 2255, or, in appropriate cases, to obtain release under 28 U.S.C. 2241. It is hard to believe, however, that, in enacting Section 3585, Congress intended federal prisoners to use the extraordinary remedy of habeas corpus to obtain interim sentencing credit, thereby flooding already overburdened federal courts with a large volume of routine requests for relief to which prisoners are statutorily entitled.

The same lack of adequate procedures that would render cumbersome any effort to modify the periods of credit awarded at sentencing would also present an obstacle to the correction of judicial credit awards that are based on errors of fact. Such errors could arise with some frequency, given the court's limited ability to verify key facts bearing on the amount of credit due. Parties could avail themselves of the limited opportunities for correcting the sentence in the sentencing court, or could utilize the cumbersome mechanism for appeal of sentences under 18 U.S.C. 3742. However, even these means of redress would be

available, at most, for only 30 days following sentencing.

In contrast, BOP retains unlimited flexibility, once the prisoner begins to serve his sentence, to modify the credit calculation to adjust to changing circumstances. In addition, in a system in which calculating credit is the responsibility of BOP, prisoners can always seek adjustment of their credit awards through the system of administrative appeals established by regulation, which incorporates strict deadlines insuring prompt resolution of such claims. See 28 C.F.R. 542.10 *et seq.* And if the defendant is dissatisfied with BOP's determination of credit, he may seek judicial review after exhausting his administrative remedies (as was the case under the 1966 statute). See *United States* v. *Brumbaugh*, 909 F.2d at 291; *United States* v. *Lucas*, 898 F.2d at 1555-1556; *United States* v. *Mathis*, 689 F.2d 1364, 1365 (11th Cir. 1982). A person in respondent's position therefore will not be denied an opportunity to have a court review his claim; that review will simply occur after BOP has first had the opportunity to assess the claim in light of the comprehensive guidelines for calculating sentencing credit that BOP has developed over the years.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 1991

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

No. 2:88-00016

Judge Morton

UNITED STATES OF AMERICA

v.

RICHARD WILSON

[Received Mar. 28, 1991]

[Entered Mar. 29, 1991]

ORDER

This matter is before the court upon remand from the United States Court of Appeals for the Sixth Circuit for resentencing and upon stipulation by the parties, as evidenced by the signatures below of counsel, that the defendant, Richard Wilson, is entitled to credit for time served from October 8, 1988 to November 28, 1989, for total credit of 13 months and 20 days, toward the sentence of 96 months imposed in this case.

IT IS THEREFORE THE JUDGMENT OF THE COURT THAT the defendant is committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of ninety-six (96) months and that he be given credit against the term of imprisonment for time in custody from October 8, 1988 to November 28, 1989, for total credit of 13 months and 20 days. The orders of the court with respect to supervised release and fine as entered in the Judgment on December 6, 1989, shall remain as previously ordered.

/s/ L. Clure Morton
L. CLURE MORTON
Senior U.S. District Judge

APPENDIX B

U.S. Department of Justice
Federal Prison System

Washington, D.C. 20534

OPI : MISB
Number : 5880.24
Date : September 5, 1979
Subject : Sentence Computation, Jail Time Credit Under 18 USC 3568

Program Statement

1. *PURPOSE.* To establish the procedures to be followed for making jail-time credit determinations.

2. *DIRECTIVES AFFECTED.* PS 5880.19, *Credit for Time in Custody Under 18 USC 3568,* (5-27-75), is superseded.

3. *BACKGROUND.* Prior to October 2, 1960, credit for time in custody before sentencing was left to the discretion of the sentencing court. The presumption was that the sentencing judge would take the amount of time spent in custody prior to sentencing into consideration at the time sentence was imposed. This first crediting statute (P. L. 86-691, an amendment to 18 USC 3568) granted credit on minimum-mandatory sentences. These were primarily the sentences imposed under the Harrison Narcotic Act of 1956.

Judicial decisions later extended jail credit for those sentenced to the maximum sentence for violation of

any statute, on the presumption that the sentencing court did not take the amount of jail time into consideration at the time of sentencing. As policy, this applied only to those sentenced after the effective date (October 2, 1960) of P. L. 86-691.

The passage of the Bail Reform Act of 1966 (P. L. 89-465) further expanded the credit to be given under 18 USC 3568 to all persons sentenced on and after the effective date of the Act (September 20, 1966). The language of the Act required credit for all time in custody in connection with the federal offense. Case law confirmed the application of the Act to YCA, FJDA, and NARA sentences. Courts also expanded federal jail credit to include periods of custody wherein the primary custody was with a non-federal agency. Credit was held to be applicable on any subsequent federal term of confinement because of the effect the federal charges (through a warrant or detainer) had on the non-federal custody.

4. *STATUTORY AUTHORITY.* Jail time credit is controlled by 18 USC 3568, which states "The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or act for which sentence was imposed."

5. *POLICY.* "In custody" is defined, for purposes of this program statement, as *physical* incarceration in a jail-type institution or facility. It does not include all time that may be considered custody for habeas corpus jurisdiction purposes, for example in the case of *Hensley v. Municipal Court*, 411 U. S. 345 (1973) (See *Cochran v. U. S.*, 489 F.2d 691 (C.A. 5, 1974)).

Any part of a day spent in custody equals one day for credit purposes. Credit will be applied in the following manner for the following situations:

a. Sentences imposed prior to September 20, 1966.

Jail time credit will be applied 1.) to those sentences in which the maximum penalty was imposed, 2.) if the penalty of imprisonment added to the number of days in presentencing custody exceeds the maximum for the offense, or 3.) if the violation required the imposition of a minimum-mandatory penalty, and if the criteria in paragraph 5.b. are met.

(1) To determine if the maximum sentence was imposed, refer to the penalty provisions of the sections violated in the appropriate Title of the U. S. Code. If the sentence imposed represents the aggregation of terms on more than one count, jail time credit will be applied to the applicable count, prior to aggregating the terms.

(2) If a sentence is less than the maximum, but adding the sentence to the number of jail days exceeds the maximum for the offense, then jail time credit will be applicable for the number of days that caused the maximum for the offense to be exceeded.

(3) On a sentence imposed for an offense requiring the imposition of a minimum-mandatory penalty, the sentence imposed does not have to be the minimum-mandatory term. Any sentence imposed under the section requiring the minimum-mandatory penalty will be entitled to jail credit.

b. Sentences imposed on and after September 20, 1966.

(1) Jail time credit will be given for time spent in the custody of the Attorney General (whether actual or constructive) as a direct result of the acts or offenses which resulted in the federal sentence. (See Paragraph 5.c. for the criteria for constructive federal custody.)

(2) Jail time credit will not be given for any portion of time spent serving another sentence, either federal or non-federal, except that time spent serving a sentence that is vacated will be creditable toward another sentence if the later sentence is based on the same charges that led to the prior, vacated sentence. When failure to make bail due to indigency is a moot point, e.g., when another sentence is operative for the period of time in question, and any bail would not result in a change in custody status, then applying jail time would be giving double credit, i.e., credit on two separate and distinct sentences for the same period of time contrary to the intent of 18 USC 3568 to apply credit to sentences.

(3) Time spent under a writ of habeas corpus from non-federal custody will not, in itself, be considered for the purpose of crediting jail time. The primary reason for custody in this case is not the federal charge. In this situation, it is considered that the federal court "borrowed" the prisoner under the provisions of the writ for purposes of

court appearance. This is secondary custody. Credit may infrequently be given under provisions of another paragraph.

(4) Time spent in residence in a *residential community center* (or a community based program located in a Metropolitan Correctional Center or jail) under P.L. 91-492 as a condition of parole (18 USC 4209) or probation (18 USC 3651) is not creditable as jail time since the degree of restraint provided by residence in a community center is not sufficient restraint to constitute custody within the meaning or intent of 18 USC 3568. However, time spent in a *jail-type facility* (not including a community based program located in a Metropolitan Correctional Center or jail) as a condition of probation is creditable as jail time because of the greater degree of restraint.

(5) Time spent in residence in a *residential community center* (or a community based program located in a Metropolitan Correctional Center or jail) under the provisions of 18 USC 3146 as a condition of bail or bond, including the "Pretrial Services" program (18 USC 3152-3154), is not creditable as jail time since the degree of restraint provided by residence in a community center is not sufficient restraint to constitute custody within the meaning or intent of 18 USC 3568. Also, a "highly restrictive" condition of bail or bond, such as requiring the refendant to report daily to the U. S. Marshal, is not considered as time

in custody. However, time spent in a *jail-type facility* (not including a community based program located in a Metropolitan Correctional Center or jail) as a condition of bail or bond is creditable as jail time because of the greater degree of restraint.

c. Constructive Federal Custody.

(1) For time in non-federal custody when the non-federal custody is bases [*sic*] on charges that later resulted in a federal sentence:

(a) Credit will be given for all time spent in non-federal or foreign custody when the underlying basis for custody in fact is a federal warrant. For example, if a federal warrant is issued and the prisoner is arrested by county police or foreign officials on the basis of the federal warrant, credit will be given from the date of arrest to the date of sentence for all days in custody. Inquiries or requests for foreign jail time credit, along with copies of the judgment and commitment and BP-5, and copies of any documentation in the institution or in the possession of the inmate, must be sent to the central office Chief of Administrative Systems for verification and monitoring purposes.

(b) If the federal inmate has been in presentence state custody on essentially the same charges, credit will also be given even though a federal detainer may not have been on file during that

time. Credit will be given for time spent in non-federal pre-sentence custody when the non-federal and federal charges are similar enough to be considered the same criminal act or offense. This is applicable when the factors of time, location, and the criminal acts are identical in both charges. Credit will also be given for all time spent serving a state sentence (on the same charges as defined in this paragraph) which is later vacated, set aside, or dismissed, in addition to any other non-federal presentence time. Following are some situation examples:

1 If a prisoner is arrested by county police on a state charge of armed robbery, and the prisoner is later convicted by the federal government of bank robbery, which bank robbery occurred during the same, identical act of armed robbery, credit will be given for all time spent in custody from the date of arrest to the date of the imposition of the first sentence (whether federal or non-federal).

2 If a prisoner is arrested by state police on a state charge of auto theft, and the prisoner is later convicted of a Dyer Act violation, involving theft of the same automobile in both state and federal charges, credit will be given for all time spent in custody from the date of arrest to the date

of imposition of the first sentence (whether federal or non-federal). Credit is applicable because the state auto theft was the same criminal act, at the same time and place as the Dyer Act violation.

3 If a prisoner is arrested by city police on a state charge of uttering a forged check and the prisoner is later convicted by the federal government for mail theft, the prisoner having obtained the check in question from the mails, credit will not be given. It is not the identical criminal act. Uttering requires a separate criminal act from theft of the check.

4 If a prisoner is arrested by county police on a state charge of armed robbery and the prisoner is later convicted by the federal government for possession of an unregistered firearm, which is the same firearm used in the robbery, credit will be given.

5 If a prisoner is arrested by county police on a state charge of uttering forged checks and the prisoner is later convicted of conspiracy to defraud the U.S. Government, the checks in question being U.S. Treasury checks used in the forgery, credit will *not* be given.

(2) For time in non-federal custody when the non-federal custody is based on charges

that are unrelated to the federal charges that resulted in a federal sentence:

(a) Credit will be given on any subsequent federal term of imprisonment (to inviolator terms) when the state withdraws, increases, or refuses to set bail, solely due to the fact that a federal detainer is lodged, and the state fails to give jail time credit for that time. [C]redit will be given from the time the federal detainer is lodged up to the time the sentence is executed (either federal or non-federal). The state authorities must verify the fact that their bail status is due to the lodging of the federal detainer. Failure to give jail credit (by the state) may be assumed in any of the following events: (1) the state charges are dismissed, (2) the state sentence is vacated with further prosecution deferred, thereby effectively vacating the state's award of jail credit, (3) state probation is granted, or (4) the state orders their sentence to run concurrently with the federal sentence, and the state sentence will be absorbed prior to grant of good time, resulting in no benefit from the state jail time. Ordinarily, if a sentence results from state charges, there will be a presumption that the prisoner did receive credit for presentence time, however, this may be rebutted if the prisoner can dem-

onstrate that the state did not credit the time.

(b) Credit will be given when a federal detainer is lodged, the prisoner does not make state bail based on a presumption of indigency, and the state fails to give jail credit for time. Credit will be given from the date the federal detainer was lodged up to the beginning date of either the federal or non-federal sentence, whichever occurs first. State bail must have been set. If the state charge was not bailable, no credit will apply to the federal sentence. Failure to give jail credit (by the state) may be assumed in any of the following events: (1) the state charges are dismissed, (2) the state sentence is vacated with further prosecution deferred, thereby effectively vacating the state's award of jail credit, (3) state probation is granted, or (4) the state orders their sentence to run concurrently with the federal sentence, and the state sentence will be absorbed prior to grant of good time, resulting in no benefit from the state jail time. Ordinarily, if a sentence results from the state charges, there will be a presumption that the prisoner did receive credit for presentence time, however, this may be rebutted if the prisoner can demonstrate that the state did not credit the time.

(3) For time spent in custody of the Surgeon General as a civil commitment under Title I of NARA, credit will be given for all time in actual institutional confinement, if the later criminal sentence is a result of the same offense that led to the civil commitment. This is a specific provision of NARA, as codified under Title 28, U. S. Code, Section 2903(d).

6. *DOCUMENTATION.* Credit will be given only with proper documentation, indicating the prisoner was in custody within the application of paragraph 5. Proper documentation will consist of written documentation for the file from any law enforcement agency (including probation officers). This includes verified phone and teletype messages.

When there is cause to believe that credit may be due, arising from a request from the inmate or from other persons speaking in his behalf, or from any inconsistencies in the manner in which the factual situation presents itself, an effort to obtain the documentation necessary to make a determination will be made. Ordinarily this will consist of one communication (with written documentation that contact was made, either in the form of a carbon of the letter or teletype message, or by documenting the phone call) and one following communication if no response is received.

If the follow-up communication still produces no response, the matter should be referred to the Regional Office. No further action should be taken locally in that particular case until instruction is received from the Regional Office.

Sample letters of suggested types of communications to other agencies are in the attachments to his Program Statement.

/s/ Norman A. Carlson
NORMAN A. CARLSON
Director

APPENDIX C

OPERATIONS
MEMORANDUM

Number: EMS OM 154-89 (5883)

Date: October 23, 1989

Subject: Credit for Time in Custody Under 18 USC 3585 (b)

CANCELLATION DATE: OCTOBER 31, 1990

I. PURPOSE: TO ADVISE STAFF OF THE PROCEDURES FOR THE CREDITING OF JAIL TIME UNDER TITLE 18, U.S. CODE, SECTION 3585(B).

II. DIRECTIVE REFERENCED:
PROGRAM STATEMENT 5880.24, SEPTEMBER 5, 1979, "SENTENCE COMPUTATION, JAIL TIME CREDIT UNDER 18 USC 3568".

III. BACKGROUND: PRIOR TO NOVEMBER 1, 1987, JAIL TIME CREDIT, FOR TIME IN CUSTODY BEFORE SENTENCING, WAS CONTROLLED BY TITLE 18 USC, SECTION 3568. AS STATED UNDER THAT SECTION . . . "THE ATTORNEY GENERAL SHALL GIVE ANY SUCH PERSON CREDIT TOWARD SERVICE OF HIS SENTENCE FOR ANY DAYS SPENT IN CUSTODY IN CONNECTION WITH THE OFFENSE OR ACTS FOR WHICH SENTENCE WAS IMPOSED". PROGRAM STATEMENT 5880.24, "SENTENCE COMPUTATION, JAIL TIME CREDIT UNDER 18 USC 3568", ESTABLISHED THE PROCEDURES FOR MAKING JAIL TIME

CREDIT DETERMINATIONS. HOWEVER, WITH THE IMPLEMENTATION OF THE COMPREHENSIVE CRIME CONTROL ACT (CCCA) ON NOVEMBER 1, 1987, SECTION 3568 WAS REPEALED FOR OFFENSES COMMITTED ON OR AFTER THAT DATE. FOR OFFENSES COMMITTED PRIOR TO NOVEMBER 1, 1987, THE PROVISIONS OF SECTION 3568 AND PROGRAM STATEMENT 5880.24 REMAIN IN EFFECT.

IV. ACTION: THE FOLLOWING PROVISIONS OF TITLE 18, USC, SECTION 3585 (B), CONTROL THE CREDITING OF JAIL TIME CREDIT, FOR OFFENSES COMMITTED ON OR AFTER NOVEMBER 1, 1987.

SECTION 3585 (B) CREDIT FOR PRIOR CUSTODY—

"A DEFENDANT SHALL BE GIVEN CREDIT TOWARD THE SERVICE OF A TERM OF IMPRISONMENT FOR ANY TIME HE HAS SPENT IN OFFICIAL DETENTION PRIOR TO THE DATE THE SENTENCE COMMENCES—

(1) AS A RESULT OF THE OFFENSE FOR WHICH THE SENTENCE WAS IMPOSED; OR

(2) AS A RESULT OF ANY OTHER CHARGE FOR WHICH THE DEFENDANT WAS ARRESTED AFTER THE COMMISSION OF THE OFFENSE FOR WHICH THE SENTENCE WAS IMPOSED; THAT HAS NOT BEEN CREDITED AGAINST ANOTHER SENTENCE."

UNDER SECTION 3585 (B), AN INMATE WILL RECEIVE JAIL TIME CREDIT ON THE FED-

ERAL SENTENCE, FOR TIME SPENT IN PRE-SENTENCE CUSTODY IN CONNECTION WITH THE FEDERAL OFFENSE; AND FOR ANY TIME SPENT IN PRE-SENTENCE CUSTODY AFTER THE DATE OF THE FEDERAL OFFENSE, IF CREDIT IS NOT AWARDED TOWARD SERVICE OF ANOTHER SENTENCE. FOR EXAMPLE, IF AN INMATE IS ARRESTED ON STATE CHARGES, AFTER THE DATE OF THE FEDERAL OFFENSE, AND IT IS DETERMINED THAT THE STATE DID NOT CREDIT THE PRE-SENTENCE CUSTODY TOWARD A STATE SENTENCE, THE TIME SPENT IN STATE PRE-TRIAL CUSTODY, AFTER THE DATE OF THE FEDERAL OFFENSE, WILL BE CREDITED TOWARD THE FEDERAL SENTENCE.

IN THE FOLLOWING SITUATIONS, IT MAY ALSO BE DETERMINED THAT THE STATE HAS NOT AWARDED CREDIT TOWARD THE STATE SENTENCE IF:

(1) THE STATE CHARGES ARE DISMISSED,

(2) THE STATE SENTENCE IS VACATED WITH FURTHER PROSECUTION DEFERRED, THEREBY EFFECTIVELY VACATING THE STATE'S AWARD OF JAIL CREDIT,

(3) STATE PROBATION IS GRANTED, OR

(4) THE STATE ORDERS THEIR SENTENCE TO RUN CONCURRENTLY WITH THE FEDERAL SENTENCE, AND THE STATE SENTENCE WILL BE ABSORBED PRIOR TO GRANT OF GOOD TIME, RESULTING

IN NO BENEFIT FROM THE STATE JAIL TIME.

ORDINARILY, IF A SENTENCE RESULTS FROM STATE CHARGES, THERE WILL BE A PRESUMPTION THAT THE INMATE DID RECEIVE CREDIT FOR THE PRE-SENTENCE TIME. HOWEVER, IF IT CAN BE DEMONSTRATED THAT THE STATE DID NOT CREDIT THE TIME, THE PRE-SENTENCE CREDIT WILL BE AWARDED FOR TIME IN STATE CUSTODY, AFTER THE DATE OF THE FEDERAL OFFENSE.

THESE PROCEDURES, UNDER SECTION 3585 (B), ONLY APPLY TO OFFENSES COMMITTED ON OR AFTER NOVEMBER 1, 1987. QUESTIONS CONCERNING THESE PROCEDURES MAY BE REFERRED TO ED HAYNES, CHIEF INMATE SYSTEMS BRANCH (FTS 724-3050).

CLAIR A. CRIPE
General Counsel

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 312324 45164

[redacted]

[redacted] Supreme Court

[redacted], 1997

[redacted],

Petitioner

v.

[redacted] WILSON

On Writ of Certiorari to the
[redacted] Court of Appeals
for the Ninth Circuit

BRIEF OF THE RESPONDENT

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[redacted] N.W.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1745

UNITED STATES, *Petitioner*

v.

RICHARD WILSON

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF THE RESPONDENT

STATEMENT

Respondent, Richard Wilson, who had no prior criminal record, was arrested and taken into custody on a state warrant on October 5, 1988 and charged with several robberies. On December 15, 1988, respondent was indicted in federal court for conspiracy to obtain money from the Bank of Putnam County, Tennessee by kidnapping its President. He was arrested on the federal charge on May 17, 1989, although he continued in state custody. Pet.App. 2a-3a.

On November 29, 1989, respondent plead guilty to the federal charge under an agreement that limited his incarceration to 96 months, with the government to take no position as to whether respondent would receive credit for the time he had spent in custody since October 5, 1988. J.App.C.A. 12. The district court accepted the guilty plea. At the sentencing hearing on November 29, 1989, the court determined that the base offense level was 18 and with upward adjustments for possession of a firearm during the offense, for the victim being a bank, and for respondent's role as a leader or organizer of the offense for an adjusted offense level of 26. The court then reduced this level by 2, finding respondent to have accepted responsibility. J.App.C.A. 40-41. For an offense level of 24, a person with no prior criminal history (Category I) the sentencing range was determined to be 51 to 63 months. The court found that respondent's planned use of high school students as coerced participants in his criminal scheme and the inadequacy of his criminal history category were aggravating circumstances not adequately considered by the Sentencing Commission, and departed above the guideline range to a sentence of 96 months.

Respondent argued that the district court should credit his time in custody since his arrest in October 1988, under the provisions of 18 U.S.C. § 3585 since he had not received credit for that time against any other sentence. J.App.C.A. 69-71. The government's position at the sentencing hearing was that an upward departure was warranted and that it would take no position on the question of respondent's request for jail credit stating that it was up to the court. J.App.C.A. 72. The court declined to grant jail credit for the time respondent was in custody from his arrest until imposition of sentence. J.App.C.A. 73. Respondent then filed a timely Notice of Appeal to the United States Court of Appeals for the Sixth Circuit.

Meanwhile, on December 5, 1989, respondent plead guilty in state court in Tennessee for three felony offenses. On December 12, he received sentences aggregating 15 years, to be served at 30% and to run concurrent

with the federal sentence. On the same date he was transferred to federal custody where he has remained ever since. The state court judgment ordered that respondent receive credit for 429 days of jail credit. Gov't C.A.Br. Addenda A-C.

The Court of Appeals affirmed the upward departure, but reversed as to the denial of jail credit, finding, as to 18 U.S.C. § 3585, "[t]he language of the new statute is both broad and mandatory, rather than narrow and permissive, stating that a defendant '*shall* be given credit' for '*any* time he has spent in official detention . . . as a result of *any* other charges'" (emphasis original). Pet. App. 5a-6a. The Court of Appeals remanded the case to the district court for resentencing with a grant of any jail credit which had not been credited against another sentence at the time federal sentence was imposed. Pet. App. 8a. Following the denial of the government's petition for rehearing, the district court resentenced respondent, awarding him credit against his sentence for 429 days of pre-sentence detention. Brief of the United States App. 1a-2a.

Respondent has been in custody continuously since his arrest on October 5, 1988. Since December 12, 1989, he has been in federal custody. On October 25, 1991, the Tennessee Board of Paroles recommended respondent's release on parole to his federal sentence. Appendix A *infra*. Thus, although his time in custody prior to imposition of sentence has been credited against both federal and state sentences, his state incarceration has been ordered to run concurrently with the federal sentence. In fact, his state incarceration has already concluded with his release on parole before his release from federal incarceration. Even without parole release, and without jail credit, respondent would serve his state sentence in 4 and ½ years (15 years at 30%). Respondent will have fully served his state sentence well before he is released from federal custody. Given federal good time that approximates 15% of the sentence, he will serve roughly 6 and ¾ years. Thus, although he would have technically received credit against

his state sentence, if the Government's position is adopted, respondent's actual time in custody will have exceeded the sentence that Congress intended for him to serve by 429 days.

SUMMARY OF ARGUMENT

When Congress rewrote the statute that was to become 18 U.S.C. § 3585, it did so as part of the most comprehensive revision of federal criminal law this century. The Sentencing Reform Act of 1984 completely restructured the sentencing process in federal courts. The discretion of sentencing judges was severely restricted; parole was abolished and good time credits were reduced and made more predictable. The goals of Congress were to reduce unwarranted disparity and to increase certainty and fairness in the imposition of federal criminal sentences. A small, but consistent part of this reform was the revision of the law on jail credits that mandated the award of credit for all post offense, pre-sentence detention time, except that which had already been credited elsewhere. The Court of Appeals correctly held that an integral part of that change was to replace the Attorney General in the decision making process with the sentencing court.

The Government argues that Congress could not have intended to make such a change without saying so explicitly since the Attorney General had developed expertise in this area in over 25 years. This argument is fundamentally flawed because it fails to consider that the statute is part of the Sentencing Reform Act which wrought a major change in federal sentencing. Section 3585 was intended to allow, and in fact to require, the sentencing judge to determine at the time of sentencing the precise sentence which the convicted defendant would actually serve, subject only to the award of good time credits that could reduce the time in custody in a precise and predictable manner. With the implementation of the Sentencing Reform Act, no longer would the sentencing judge impose a sentence of incarceration that would only

be a maximum sentence, with the actual time in custody determined much later by the Parole Commission or the Bureau of Prisons, subject to revision by either or both at any time prior to release. Congress decided that disparate sentences of uncertain and changing duration were counterproductive to the proper interests of sentenced inmates and society.

The Sentencing Guidelines mandated by Congress in the Sentencing Reform Act would reduce substantially unwarranted disparity by limiting the range of sentences available for a particular offense committed by an offender with particular characteristics. Once the length of sentence was determined, the abolition of parole would reduce the uncertainty of how much time would actually be served before release. Reducing good time credits and providing that once awarded, or denied, they could not later be restored, or taken away, added to the certainty, at the time of imposition, of a federal sentence. This "truth in sentencing" was enhanced by mandating the award of credit for prior jail time served and removing the power from prison administrators to award or deny it.

For the district court to determine and award jail credit is not only consistent with the rest of the Sentencing Reform Act, but is logical and practical. Given the clear mandate of the statute, the only issues to be resolved are whether the questioned time was in "official detention" and whether it has already been "credited" elsewhere. These are justiciable questions of fact and law or mixed fact/law questions that district courts are particularly suited to answer and, as the Government admits, must ultimately be resolved by the courts. Working together the court, through its probation officer, the sentenced defendant, through his attorney, and the government, through the U.S. Attorney, will be able to insure that the facts necessary to a proper determination are fully and fairly presented. In most situations, the witnesses and documents necessary for the determination

will be more accessible to the sentencing court than to a Bureau of Prisons counsellor at a distant prison. The decision, once made, will be subject to appellate review at the same time the conviction and/or sentencing is reviewed, so that at the time of imposition of sentence, or no later than at the time of the conclusion of any appeal, all concerned will know precisely how much time the defendant will actually serve, subject only, as Congress intended, to the limited award of good time credit.

This sentencing scheme designed by Congress can, of course, result in what might be construed to be double credit for time in custody, but only where a state court sentencing the defendant after federal sentencing, decides, as it has the right to do under the statute, that the defendant should receive the credit for his state, as well as federal sentences. Further, the Sentencing Reform Act included limited opportunities for post sentence correction of sentence that will allow for appropriate corrections in the rare occasions where the intent of both federal and state sentencing courts is subverted by unique circumstances.

ARGUMENT

I. WHEN CONGRESS MOVED THE AUTHORITY FOR AWARDING JAIL CREDIT FROM THE ATTORNEY GENERAL TO THE DISTRICT COURT, IT DID SO AS A LOGICAL AND PURPOSEFUL PART OF THE SENTENCING REFORM ACT OF 1984.

A. Congress Enacted 18 U.S.C. § 3585 As Part of the Sentencing Reform Act of 1984.

The fatal flaw in the Government's analysis of Congressional intent in the enactment of what became 18 U.S.C. § 3585 is the failure to consider that statute in context with the passage in 1984 of the Sentencing Reform Act of which it is an integral part. The dates when 18 U.S.C. § 3585 was enacted, 1984, and when it became effective, 1987, are not dates without other significance. They are the dates of enactment of the Sentencing Reform Act and its effective date. Viewed in context with the other provisions of that Act, it is clear that Congress did, in fact, intend to shift responsibility for the determination of jail credit for convicted defendants from the Attorney General to the sentencing court.

After many years of study, Congress included in the Comprehensive Crime Control Act of 1984, Public Law 98-473, Title II, the Sentencing Reform Act. This Act wrought sweeping changes in a sentencing system unchanged in substantial part for nearly a century. *Mistretta v. United States*, 488 U.S. 361 (1989). Congress found that the existing federal sentencing process, based loosely on a rehabilitative model, had failed. *See* Senate Report No. 98-225, 98th Cong., 1st Sess. 40 (1983), *reprinted at* 1984 U.S. Code Congressional & Administrative News, 3182, 3223 (hereafter "Senate Report"). It was characterized by substantial, unwarranted disparity in sentences imposed upon similarly situated defendants. Senate Report at 41-46. The confusion in sentencing responsibility between the sentencing court and the Parole

Commisssion resulted in uncertainty as to the duration of any sentence of incarceration, so that "prisoners often do not really know how long they will spend in prison until the very day they are released." *Id.* at 49. To address this situation, Congress crafted a comprehensive sentencing scheme that included a statement of the purposes of sentencing, use of sentencing guidelines, abolition of parole, and more certainty in the computation of good time credits. Congress intended this system to promote comprehensiveness and consistency, fairness in sentencing, certainty in release date of sentenced offenders, increased availability of sentencing options, and consistency of purpose. *Id.* at 50-60. This would be accomplished by a sentencing process in which the Court would determine a sentence using objective criteria, "whereby the offender, the victim, and society all know the prison release date at the time of the initial sentencing by the court, subject to minor adjustments based on prison behavior called 'good time.'" *Id.* at 46.

Viewed in this light, it would certainly be sensible, and probably even essential, for Congress to have shifted the determination of credit a sentenced defendant is entitled to for pre-sentencing time in detention to the time of imposition of sentence and to have provided definite guidance as to under what circumstances credit would be awarded. Thus, when it wrote the section that became 18 U.S.C. § 3585, it was entirely logical for Congress to have given that role to the sentencing court, especially since it made the award of credit for all pre-sentencing time in detention mandatory, except where it had already been credited elsewhere. To have left this determination to the Attorney General and the personnel of the Bureau of Prisons, subject to revision throughout a defendant's time in custody, would have been contrary to the desired goals of giving the sentencing responsibility to the district judge and of assuring certainty in release date.

There is another, very practical reason why the determination of the credit for prior time served should be made by the sentencing judge: Congress gave the district courts the job of setting the proper sentence under the guidelines and the allowance or denial of credits will play an important role in the judge's decision. To illustrate, the court is required to use the guidelines by determining the defendant's prior criminal history and the nature of the offense for which he was convicted, to locate the proper range of sentence. 18 U.S.C. § 3553; United States Sentencing Guidelines § 1B1.1. The court then has to consider whether there are any legitimate reasons (aggravating or mitigating circumstances not adequately considered by the Sentencing Commission) that would justify a departure above or below the guideline range and, if so, whether to depart. Obviously, that determination would inevitably be informed by the availability of prior jail time credits, one way or the other, and yet, according to the Government, the sentencing judge cannot make that determination but must leave it to the subsequent decisions of the Bureau of Prisons.

Moreover, while decisions to go outside the guidelines are relatively infrequent, the judge in every case must decide where, within the applicable guideline range each defendant should be sentenced. Since the range of sentences for a given guideline are no less than six months, the availability of mandatory credits for time previously served cannot help but influence the judge in selecting the proper sentence. Nonetheless, under the Government's theory, the district judge here would not know whether the 429 days that respondent served would or would not be credited to him when he decided whether the sentence imposed should be 51 or 63 months, or if a departure is imposed, as here, how much is necessary to impose a sentence that is "sufficient, but not greater than necessary, to comply with the purposes" of sentencing. 18 U.S.C. § 3553(a). Given Congress's clear goals of ending uncer-

tainty and disparity, and since Congress gave control over the length of the sentence to the judge not the Attorney General, assigning the role of carrying out section 3585 to the Attorney General simply makes no sense.

B. Removal of Authority from the Attorney General for the Determination of Jail Credit for Sentenced Defendants Is Consistent with Other Provisions of the Sentencing Reform Act.

As Congress prepared to initiate a new system for sentencing convicted offenders, it was troubled by the lack of certainty in the release date of incarcerated offenders. It found the cause of this to be largely the result of the shared responsibility among the sentencing court, the Bureau of Prisons, and the Parole Commission. Under the former system, the sentencing court would set what was effectively the maximum term of incarceration, the Parole Commission would set the effective release (on parole) date, while the actual release date could alternatively be determined by the award of good time and other incentive credits which could reduce the expiration of the term below the parole release date. Changes in the parole release date and the withdrawal and/or restoration of good time credits caused the actual release date to be constantly subject to change. Senate Report at 46-49; *Mistretta*, at 488 U.S. ——, 109 S.Ct. 651. This system promoted disparity and uncertainty. The disparity often was the result of sentencing judges trying to anticipate what release date would be set by the Parole Commission and setting a sentence that would permit that date in some cases and setting a date arbitrarily high or low for the purpose of subverting the anticipated parole date in other cases. Uncertainty was inevitable under a system where the release date was subject to revision at any time up until the date of release.

Believing that disparity and uncertainty were counterproductive of any legitimate goals of a sentencing process,

Congress rejected the arguments of the Parole Commission and others to maintain the Commission in some fashion. Senate Report at 53-56, 57-59. Instead, it consolidated sentencing authority in the sentencing judge so that all parties will know, as of the date of imposition of sentence, when an incarcerated defendant will be released, subject only to predictable, limited adjustments for good behavior in prison.

Clearly, if made at the time of sentencing, the determination of how much credit to award a sentenced defendant for time in custody prior to imposition of sentence will not have any impact on the issue of certainty in sentencing, unlike the parole determination under the prior system. However, as in this case, this determination can have significant impact on the release date and, therefore, consistent with its goals to reduce uncertainty and disparity, that determination had to be made at the time of sentencing by the sentencing judge. Many of the concerns that led Congress to reject a continued role for the Parole Commission similarly dictate vesting the determination of jail credit in the sentencing court instead of the Attorney General.

First, the Government argues that allowing the Attorney General, through the Bureau of Prisons, to determine jail credit will result in a more uniform application of the statute than if it is applied by the District Courts. However, Congress rejected precisely this argument when made on behalf of the Parole Commission:

> Initial decisions of the Parole Commission are made by at least 35 hearing examiners, not by the nine Commissioners. It seems unlikely that more than 40 people making administrative decisions would result in substantially less inconsistency than a few hundred people making judicial decisions after hearing arguments presented by counsel for both sides, which are subject to appellate review by eleven counts of ap-

peals sitting in panels and, ultimately, by a single Supreme Court.

—Senate Report at 54-55.

Congress also found no reason to believe that the Commission would be reliably accurate in applying guidelines, in light of studies that showed that parole examiners made errors in more than 50% of test cases, and that most of these errors were not corrected on appeal. Surely, Congress expected no more reliability in allowing hundreds of prison clerks and counsellors to determine entitlement to jail credit.

Congress also expressed a reluctance to continue a process where the resolution of factors impacting on the length of incarceration is "determined in private rather than public proceedings," Senate Report at 55. Instead, it expressed a preference for a system that "keeps the sentencing power in the judiciary where it belongs, yet permits later review of sentences in particularly compelling situations." Senate Report at 121. Thus, Congress was given the choice between determination of jail credit at some unspecified later date by one of many clerks or counsellors, subject to revision at any time, or determination in a public forum by the sentencing judge at the time of sentence imposition, subject only to review by an appellate court. Its exercise of this choice was clear and logical, particulary in light of the other policy choices made in the Sentencing Reform Act.

It is true that Congress did not expressly authorize the court to make the jail credit decision of 18 U.S.C. § 3585. Brief of the United States p. 18; *see United States v. Beston*, 936 F.2d 361, 363 (8th Cir. 1991; *United States v. Chalker*, 915 F.2d 1254, 1258 (9th Cir. 1990); *United States v. Brumbaugh*, 909 F.2d 289, 291 (7th Cir. 1990) and *United States v. Lucas*, 898 F.2d 1554, 1555 (11th Cir. 1990). But it did not expressly authorize the Attorney General either; that is why this

Court has to decide this issue. However, given the overall design of the sentencing process under the Sentencing Reform Act, it would be illogical for jail credit to be granted at any other time than the imposition of sentence and by anyone else other than the sentencing judge. The logic of respondent's position is confirmed by other aspects of the Sentencing Reform Act. In addition to abolishing parole, Congress provided that any post incarceration supervision would be determined, both as to term and conditions, at the time of sentencing. *See* 18 U.S.C. § 3583 (Inclusion of a term of supervised release after imprisonment.) It also provided guidance for the district court's determination as to whether multiple terms of imprisonment would be concurrent or conservative, 18 U.S.C. § 3584. In other words a sentence imposed by a judge that includes imprisonment "will represent the actual period of time that the defendant will spend in prison" except only for good time allowances. Senate Report at 115. Putting the decision on granting jail credit in the hands of the court at the time of sentencing adds to the certainty of term of imprisonment Congress wanted to find in the act of imposition of sentence. *Commissioner of Internal Revenue v. Engle*, 464 U.S. 206 (1984) (Court's duty is to "find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested.")

C. Congress Expressed Its Intent to Remove Jail Credit Authority from the Attorney General.

Prior to 1984, the law governing jail credit expressly designated the Attorney General as the party responsible for granting credit: "[t]he Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed." 18 U.S.C. § 3568. Concurrent with the repeal of section

3568, section 3585 was enacted without mentioning the Attorney General. Where an earlier version of legislation included a provision subsequently deleted, it can be presumed that Congress intended to delete the provision. *Russello v. United States*, 464 U.S. 16, 24 (1983). While a change in language is not an infallible guide to the intent of the legislature, *McElroy v. United States*, 455 U.S. 642, 651 n.14 (1982), here there is no conflict between the language of the statute, in excluding the reference to the Attorney General, and the legislative history of the Sentencing Reform Act with its expressed intent to place sentencing authority in the district court and its emphatic desire for certainty in release date of an incarcerated defendant at the time is imposed. *Aaron v. Securities and Exchange Commission*, 446 U.S. 680, 701 (1980) ("In the absence of a conflict between reasonably plain meaning and legislative history, the words of the statute must prevail.")

The Government argues that Congress could not have intended to remove the Attorney General from the decision-making process without doing so expressly. Brief of the United States, pages 18-19. It is true that neither the new statute, nor the legislative history dealing specifically with section 3585, mention the Attorney General or the deletion of his role in the process. Therefore, this Court should look to the language Congress used and to the legislative purpose of the Act. *United States v. Bornstein*, 423 U.S. 303, 311 (1976) ("But the absence of specific legislative history in no way modifies the conventional judicial duty to give faithful meaning to the language Congress adopted in the light of the evident legislative purpose in enacting the law in question"). Here, Congress expressed its intent by deleting reference to the Attorney General. Clearly, if Congress had intended for the determination of jail credit to continue as before, it would have done so by designating the Director of the Bureau of Prisons with such responsibility. That it chose not to do so is a recognition of the fact that the

determination of jail credit is now a part of the sentencing process, a judicial function, best decided by courts rather than an administrative function to be decided by prison staff.

Under the prior indeterminate sentencing system in which the Parole Commission determined the parole release date, it made sense for the Attorney General, who determined the mandatory release date (sentence imposed minus crdit for good time, industrial time, etc.) to also calculate jail credit. However, when Congress abandoned indeterminate sentencing with passage of the Sentencing Reform Act, it made sense to place the resolution of all factors that would influence the release date of an incarcerated defendant in the hands of the sentencing judge. Only good time credits, that cannot be determined except after the defendant has been in prison are not subject to determination at the time of imposition of sentence.

The Government makes much of the use of "was imposed" rather than "is imposed" in the wording of section 3585. Brief of the United States pp. 12-13. The Government interprets the use of the past tense to indicate that the jail credit decision is to be made at some unspecified date after sentencing. However, the use of the past tense could just as easily be interpreted to mean that Congress anticipated that the court would first determine the length of a prison sentence under the guidelines, impose that sentence, decide whether it would be concurrent or consecutive to any unserved sentence, and then reduce it by any credit for prior time in detention. This latter construction is more consistent with Congress's clearly expressed preference for certain and precise terms of imprisonment at the time of imposition of sentence. The Government's only explanation for the deletion of the Attorney General from the statute is that it is the result of "Congress's rather inelegant craftsmanship." Brief of the United States p. 18. Yet, it argues that the Court should assume that the same "in-

elegant" drafters used the past tense precisely to replace its deletion of the Attorney General. The Government cannot, we submit, have it both ways.

The Government also suggests that, since Congress used such language as "the court shall" or "the court may" in other sentencing statutes and did not refer to the court in section 3585, Congress did not intend to vest the power in the court. Brief of the United States p. 19. But the converse is also true: Congress specifically referred to the Attorney General or the Bureau of Prisons in other places and did not do so here.[1] But if the focus is on the overall intent of the statute, as it fits into the new sentencing scheme, the answer is clear. A person sentenced under the Sentencing Reform Act should leave the courtroom knowing when he will be released from prison, subject only to his behavior while incarcerated. For the sentencing judge to grant, or deny, jail credit at that time accomplishes the purposes of sentencing reform. To defer the grant, or denial, of jail credit until some later date, subject always to reassesment by a prison official, defeats, at least in part, the purposes of sentencing reform. Congress should not be seen to have intended such a result.

The Government asserts that Congress would not have intended to work such a change in light of the long history and orderly fashion in which the Attorney General had dispatched jail credit duties since 1966. Yet a similar argument was made in an effort to save the Parole Commission. It too had been involved for years in the sentencing process, determining the release date for most prisoners. In more recent years, it too had developed a set of guidelines to make its actions more uniform and consistent. *Mistretta* at 109 S.Ct. 651. It too had a trained cadre of administrators applying its guidelines.

[1] Congress vested the Director of the Bureau of Prisons with authority for post sentence administration of incarcerated defendants in 18 U.S.C. §§ 3621-24.

Yet Congress found that the role of the Parole Commission in the sentencing process contributed to the disparity and uncertainty that debilitated the federal criminal justice system and removed it from the process. The very flexibility of determination and re-determination that the Government touts as the strength of the Attorney General's role is one of the examples of delay and uncertainty in release date that Congress wanted to avoid. The fact that Congress spent more time and was more careful to eliminate the role of the Parole Commission than it did to eliminate the role of the Attorney General in determination of jail credit is indicative, perhaps, of the lesser impact jail credit has on release date than parole. It may also be a reflection of the fact that the Parole Commission was to be disbanded, whereas the Attorney General and Bureau of Prisons were only to be relieved of a duty performed for only 25 of this nation's 200 years. But Congress's failure to speak of removing the Attorney General should not be read to mean that it intended to continue a system that would contribute to the disparity and uncertainty of sentencing in the same manner, but in a lesser degree, as the Parole Commission.[2]

[2] Respondent agrees with the Government that Congress did not intend to create a system of shared responsibility between the district court and the Attorney General. For the same reasons that Congress rejected proposals to continue the Parole Commission under a hybrid system of shared sentencing responsibility, it is highly unlikely that Congress would shift responsibility to the district court for purposes of certainty of release date and then leave the Attorney General empowered to "second guess" the district court or modify its determination at a later date on changed circumstances.

II. DETERMINING ENTITLEMENT TO JAIL CREDIT AT THE TIME OF SENTENCING IS A MORE FAIR AND ORDERLY PROCESS THAN LEAVING THE QUESTION FOR DETERMINATION BY THE ATTORNEY GENERAL AT SOME UNSPECIFIED LATER DATE.

A. Determining Jail Credit at the Time of Imposition of Sentence Allows for Full and Fair Development of Any Factual and Legal Issues in a Timely Manner and in a Convenient Forum Equipped to Resolve Such Issues.

In the vast majority of cases, the grant of credit to a sentenced offender for previous time in custody will be a simple mathematical calculation of counting the days from beginning of detention until the offender is received at a correctional institution. In those cases where there is a conflict as to entitlement to credit, it will likely be over one of two readily justiciable issues: whether the questioned time was in "official detention" or whether the time has already been "credited" to another sentence. Each would involve questions of fact and/or law of the type that can and should be resolved by the sentencing judge. For instance, there could be a claim for credit for time spent on pre-trial release under restrictive conditions. The district court, after taking any evidence offered by the parties, would make factual findings and apply the law. *See, e.g., United States v. Beston*, 936 F.2d 361 (8th Cir. 1991); *United States v. Chalker*, 915 F.2d 1254 (9th Cir. 1990); *United States v. Woods*, 888 F.2d 653 (10th Cir. 1989). Or the district court might be asked to decide whether credit against concurrent state sentence, that was consumed by the federal sentence had been "credited against another sentence" within the meaning of the statute.[3]

[3] The Government also asserts, Brief of the United States 13-14, that since credit is to be awarded up to the date of receipt at a prison, which will occur after sentencing, the district court cannot make an award, not nowing when the offender will reach the institution. However, there is no reason that a judgment and commitment order can not grant credit for the number of days in detention prior to sentencing (say 100) and order that the offender will also receive credit for the days between imposition of sentence and arrival at the prison. The prison administrator would then need only to add these two figures to the time in custody at the institution and subtract the good time entitlement to determine the release date.

In making such decisions, relevant witnesses and documents will generally be within the geographical confines of the district. More importantly to a fair determination of contested facts, parties with an interest in the outcome will have equal access to subpoena power and the use of lawyers to develop and present proof and arguments in support of a position. The decision will be made in open court, on the record, at the time of sentencing, so that all concerned will know, at the time of sentencing, what impact the grant or denial of jail credit will have on the service of the sentence.

On the other hand, if the Government's position were adopted, contested issues regarding the grant or denial of jail credit will be made at a remote correctional institution based upon a record made by a correctional officer. Appendix C to the Brief of the United States illustrates a serious problem with the Government's position. The next to last paragraph provides that it will be presumed that time in detention was previously credited to a state sentence, thus placing the burden on the sentenced defendant to show otherwise. In the vast majority of cases the sentenced defendant will not have the assistance of a lawyer to find and present necessary evidence or to articulate and argue points. The defendant, with limited access to long distance telephone calls and no opportunity to personally obtain court records, etc., will be at the mercy of distant court clerks, half way house staff, and overworked probation officers for information needed to support his position. Some sentenced defendants will be

up to this task; many will not. Even those who persevered would face administrative appeals and ultimately a court challenge, probably *pro se*, before the matter was finally resolved, perhaps, as was the case with parole and good and industrial credits under the old sentencing scheme, not until the day of release.

Even the Government admits that the Bureau of Prisons will not be the final authority on the grant of jail time, since an inmate aggrieved by the administrative denial of jail time credit would have the right of judicial review. Brief of the United States pp. 24, 29. The question, then, is not whether the district court will be resolving the issue, but when. By resolving the issue at the outset, as the Circuit Court ruled, section 3585 becomes consistent with Sentencing Reform Act goals of placing sentencing authority in the sentencing court and avoiding uncertainty of release date for sentenced offenders.[4]

In most cases, the grant or denial of jail credit will make a material difference in the length of a sentence, sometimes a matter of months, or, as here, over a year. Particularly where there is a substantial amount of credit at stake, if the sentencing judge does not make the determination, what is likely to occur is the judge will surely try to anticipate and fashion a sentence that takes the grant or denial into account. If the court guesses wrong, or makes no effort to account for jail credit, then the resulting sentence will not be a comprehensive and consistent expression of the punishment tailored to fit the crime and the offender. Thus, the purposes of the Sentencing Reform Act will be served in a haphazard fashion. Giving the sentencing court the authority to determine jail credit will make it easier for the sentencing court to accurately impose the appropriate sentence for the convicted offender.

[4] The tortured logic of the Government's explanation why respondent would not get credit for jail time illustrates the likelihood that such issues will be litigated in district court sooner or later. Apparently, the Government would deny credit since respondent's "total" state sentence would not be consumed by the federal sentence, although the operations memorandum requires only that the "sentence" be consumed. The difference is apparently whether parole time is counted, or just time in custody.

The Government advocates the advantages of the informality and flexibility of allowing a prison staff member to decide jail credit by means of a phone call and reference to internal guidelines. Flexibility, apparently also means that the award or denial of credit would be subject to reversal on changed circumstances throughout the period of incarceration, but that is inconsistent with Congress' stated desire for certainty in release dates. Moreover, informality is often not desirable for the fair resolution of contested issues, particularly where that informality comes at the expense of one party's ability to affect the outcome of the decision.

Furthermore, although the prison official would bring expertise and the ability to get information over the telephone to the decision making process, so would the probation officer, who has the same flexibility in information gathering techniques, with the added advantage of familiarity with the defendant and his circumstances pretrial. The probation officer would also be familiar with local institutions of confinement, local record keeping procedures and personnel, whereas the prison official would usually have no knowledge of state and local jail practices. The probation officer, in the course of preparing the pre-sentence report already investigates the convicted offender's prior criminal history, which would include much of the information necessary to decide whether he is eligible for credit for time in custody. And to the extent that the policies and procedures developed by the Bureau of Prisons regarding jail credit are instructive in applying the mandate of section 3585, the sentencing court can give them appropriate consideration when

brought to its attention by the probation officer or by one of the parties.

In rejecting arguments for the continued role of the Parole Commission, Congress already determined that administrative decisions by a relatively large number of functionaries of questionable accuracy are less desirable for insuring relatively uniform application of sentencing principles to the determination of sentencing issues than the system of federal district courts, with review by the courts of appeal and ultimately this Court. Senate Report at 54-55. There is no reason to believe that Congress reached any different conclusion on whether the Bureau of Prisons should determine jail credit rather than the sentencing judge.

B. Determining Jail Credit at the Time of Imposition of Sentence Will Not Result in the Unintentional and Unwarranted Award of Double Credit for Time in Custody.

The only legitimate interest articulated by the Government is the prevention of "double credit" for time in custody. Absent this concern, it would appear that the Attorney General is motivated only by an effort to recover authority shifted from him to the courts by the Sentencing Reform Act, or to secure additional leverage against sentenced inmates. However, the statutory goal of avoiding the award of "double credit" is adequately served, if not better so, by having the decision made at the time of sentencing, by the sentencing court.

The Government argues that allowing the Attorney General to award jail credit would prevent what it suggests was an unwarranted award of "double credit" in situations like the one presented in this case. The fallacy of the Government's position is that it overlooks the important and proper role expressly left by Congress to the state sentencing authorities by the provisions of section 3585. In this case, for example, the state court decided

to award credit against the state sentence for pretrial time in custody, only after the district court had initially declined to award such credit against the federal sentence. The state court then decided, as it has the right, to run its sentences concurrent with the federal sentences and release the respondent to the service of his federal sentence. The state parole authority has since paroled respondent to the federal sentence.

It is inevitable, when sentences are to be imposed upon one person by separate sovereigns, that one sovereign must sentence first. Because of the dictates of the Speedy Trial Act, 18 U.S.C. §§ 3161 *et seq.*, the federal court will often be the first to sentence. This potentially gives an advantage to the state to sentence later, taking into account the conditions of the federal sentence. The state can then choose whether to order its sentence concurrent or consecutive, vary the length of the sentence within the limits of state sentencing laws and any plea agreement, and, if the defendant is in state custody, choose whether to release the defendant for the service of the federal sentence. In enacting section 3585, Congress made the policy decision to opt for finality and certainty as to the federal sentence in favor of the endless post-sentence adjustment of a sentence to account for the sentencing actions of other jurisdictions. This policy choice also acknowledges that it is legitimate for the state, if it imposes sentence second, to make decisions that can effect the total time in custody for the sentenced offender, even if that means there will be some "double counting" of time in custody.

Some situations where post-sentence events indicate the award or denial of jail credit was erroneous may be corrected through Rule 35(a)(2) and (c), F.R.Cr.P. and 18 U.S.C. § 3582(c). It may be that some such situations can not be remedied, just as on some occasions, post-sentence events, or discoveries, may demonstrate the error of the term or conditions of any criminal sentence,

yet no relief is available. Nevertheless, Congress chose to accept this risk in favor of a process that would enhance the uniformity and certainty of federal sentences and release dates for incarcerated defendants. Given the language and context of section 3585, it is clear that Congress made this choice. In the vast majority of cases, allowing the sentencing court to determine jail credit will result in a more fair and accurate determination and insure, to the extent possible, that the sentence imposed reflects the amount of time the sentenced offender will actually spend in custody, subject only to reduction for good time credits. This certainty in sentencing is consistent with the stated goals of the Sentencing Reform Act to make federal criminal sentencing "fairer and more certain." Senate Report at 65.

CONCLUSION

For the foregoing reasons, respondent urges this Court to affirm the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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Inmate copy

STATE OF TENNESSEE

BOARD OF PAROLES

404 JAMES ROBERTSON PARKWAY SUITE 1300
NASHVILLE, TENNESSEE 37219 • (615) 741-1673

TO: Inmate Richard Wilson No. TDOC#134946 Fed#12358-075 Unit FCI Mariann, FL

FROM: Tammy Hall, Administrative Secretary

DATE: October 30, 1991

SUBJECT: Final Parole Hearing Disposition

The decision of the Parole Board in your case:

_____ The final disposition of your grant/revocation hearing is

_____

_____

X You have been recommended for release on parole.
To His Federal Sentence

_____ Please complete the attached release plan and return to me.

_____ Your case has been continued until _____.

_____ Your case has been declined until _____.

_____ The final disposition of your parole hearing has been delayed because you received a split vote. You will be notified immediately when a final disposition is rendered.

(If you have questions, please contact me.)

cc: File
Case Manager
ICC File

APPENDIX A

STATE OF TENNESSEE

BOARD OF PAROLES

Certificate of Parole

No. 49932

Having been certified eligible for parole by the Department of Correction and duly considered by the Board of Paroles: parole is granted to the prisoner named hereon under the conditions cited below. Said parole shall expire upon the sentence expiration date and a Certificate of Discharge shall be issued, provided the Board is satisfied that the parolee has kept the conditions of parole in a satisfactory manner.

1. I will go directly to my destination, and upon arrival, report immediately to my Parole Officer, under whose supervision I am paroled, unless otherwise, directed.
2. I will obey the law of the United States, or any State in which I may be, as well as any municipal ordinance.
3. I will report all arrests, including traffic violations, immediately, regardless of the outcome, to my Parole Officer.
4. I will not own, possess, or carry any type of deadly weapon (guns, rifles, knives or any illegal weapons). I further understand that under provision of Federal and State law, I am subject to prosecution if I violate this condition.
5. I will work steadily at a lawful occupation, and support my dependents (parents, spouse, children, and others), to the best of my ability. If I become unemployed, I will immediately report this to my Parole Officer and then begin to look for another job.
6. I will get the permission of my Parole Officer before changing my residence or employment, or before leaving the County of my residence or the State.
7. I will allow my Parole Officer to visit my home, employment site, or elsewhere, and will carry out all instructions he/she gives, and report to my Parole Officer as given instruction to report. I will submit to electronic monitoring if required.
8. I will not use intoxicants (beer, whiskey, wine, etc.) of any kind to excess, or use or have in my possession narcotic drugs or marijuana. I will submit to drug testing if required.
9. I agree to pay all required fees to the supervision and Criminal Injuries Fund.

NAME: Richard Wilson PRISON NUMBER: 134946

Having been convicted as follows:

DOCKET NUMBER	# OF COUNTS	COUNTY	OFFENSE	MAXIMUM SENTENCE
88549F	1	Putnam	Fraud Insurance Claim	2 years
88550F	1		Burg 1	5 years
88551F	1		Aid & Abett Armed Robbery	10 years

Parole Office Location Code: PD

Parole Officer: Chattanooga Parole Office, 540 McCallie Ave., Suite 400
Chattanooga, TN 37402 (615) 634-6333

It is hereby ordered that said prisoner be and is hereby granted Federal Parole/Early Release from TDOC, effective and that the parolee immediately, upon release from custody report to his/her parole officer at the address noted above.
Parolee is also subject to the following SPECIAL CONDITIONS:

Rec. Parole with expiration date of 6-19-2003 to sentence currently serving (Arkansas) and or approved program. Report to the Chattanooga Parole Office immediately upon release.

The parolee may present his/her views about special conditions in writing to the Board through their Parole Officer.

I have read, or have had read to me this Order of Parole. I fully understand the conditions of parole, and I agree to comply with such conditions during the period of my parole. Further, I hereby waive all extradition rights and process, and agree to return to Tennessee voluntarily if at any time prior to my release from parole the Tennessee Board of Paroles directs me to do so.

Prison Official or Parole Officer	Date	X Signature of Parolee	Date

Jurisdiction: Federal Score: 2a.

DISTRIBUTION: Original-Central Office, 1st copy-Parole Officer, 2nd copy-Parolee and 3rd copy-Prison/Jail

BP 0015 (Rev. 1-90)

2a

State of Tennessee
BOARD OF PAROLES
[illegible] Parkway, Tennessee, Suite 1200
404 James Robertson Parkway
Nashville, TN 37243-0850
(615) 741-1150
[illegible]

INMATE # 134946 INMATE NAME Richard Wilson DATE OF HEARING 10-25-91

HEARING LOCATION P R INSTITUTION FCI Marianna, FL Tape# _____ Side _____

FOR OFFICIAL USE ONLY: P A P R B Y Z

TYPE OF HEARING: I
M—Mapp, P—Pardon, D—Appellate, B—Custodial, T—Mandatory, N—Not Heard, I—Initial Grant, X—Administrative, E—Executive Clemency, U—Previously Continued, Y—Previously Declined, Z—Previously Rescinded

WHO HEARD CASE: B
H—Hearing Officer, B—Board Member(s), Q—Quorum of Board, F—Full Board, Y—Delete, reschedule

RECOMMEND—To Detainer and/or Approved Program
Inmate meets minimum criteria for release.

7. Commutation _____
5. Custodial-Begin Sentence _____
3. Early Release Date
4. Effective _____
0. MAPP Contract, Effective _____
9. Other, specify in COMMENTS*
8. Pardon
1. Probationary Parole
R. Recommend, Past Release Date(s)
6. Regular Parole
2. Release Eligibility Date (RED)

CONTINUE—Until

A. Administrative Docket
D. Disposition of Court Hearing
F. Offense Report(s)
H. Schedule for Appearance Hearing
M. Additional Information Needed
N. Notify _____
Z. Other, specify in COMMENTS
P. Psychological Evaluation
R. Refer to DOC, specify who/why in COMMENTS

DECLINE—Review

J. Early Release
D. _____ PP _____ RP _____ RED _____ PAST
E. Balance of Sentence, Review at Expiration
W. Executive Clemency: _____ Pardon _____ Commutation _____ Respite

SPECIAL CONDITION(S)—for release on Parole

R. Medical Job Waiver
3. Evaluation for Mental Health Treatment
V. No Driving
N. No Special Conditions
9. Other, specify in COMMENTS*
P. Permanent Job Waiver
S. Sex Offender Treatment
2. Evaluation for Substance Abuse Treatment
T. Temporary Job Waiver
L. Living Condition _____
7. Restitution _____

REASON FOR DECLINE
C. Adversely Affect Discipline
A. Participate in Alcohol Program
D. Participate in Drug Program
E. Participate in Education Program
P. Participate in Mental Health Program
S. Complete Sex Offender Program
V. Complete Vocational Program
W. Disciplinary Report(s)
R. High Risk
Z. Other, Specify—COMMENTS*
I. Inadequate Release Plans
B. Seriousness of Offense

*COMMENTS: 9 2

REMARKS: _____

Hearing Official(s) _____

DATE	INITIALS	ADP.	MOD.	REJ.
10-25-91	[illegible]	☐	☐	☐
10/29/91	[illegible]	☐	☐	☐
10-29-91	[illegible]	☐	☐	☐
		☐	☐	☐
		☐	☐	☐
		☐	☐	☐
		☐	☐	☐

3 - (9- to federal sentence)
(3) (9- to federal sentence)
(3) (9 to federal sentence)

PREDICTION SCALE SCORE _____

Original—BOP file Canary—Institutional file Pink—Inmate

BP-0061
Rev. 11/90

3a

No. 90-1745

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD WILSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1745

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD WILSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Respondent bases much of his argument on the assertion that the Sentencing Reform Act "place[d] the resolution of all factors that would influence the release date of an incarcerated defendant in the hands of the sentencing judge." Br. 15. That assertion, however, does not accurately describe what Congress did in the Sentencing Reform Act.

The principal goals of the Sentencing Reform Act were to obtain consistency in the duration of imprisonment for similarly situated offenders, and to eliminate "uncertainty as to the time the offender would spend in prison." *Mistretta* v. *United States*, 488 U.S. 361, 366 (1989). See also S. Rep. No. 225, 98th Cong., 1st Sess. 44-49 (1983). The calculation of sen-

tencing credit has nothing to do with eliminating uncertainty as to the total *duration* of a defendant's prison term, but only with deciding how much of the sentence the offender has left to serve. Thus, awarding credit against a sentence for prior detention is fundamentally different from deciding *how long* the offender should spend in jail. It was the inconsistency and unpredictability in the latter decision that Congress sought to eliminate through sentencing reform. See S. Rep. No. 225, *supra*, at 46-48.

Although Congress stated that its goal was to maximize certainty in "the prison release date at the time of the initial sentencing," S. Rep. No. 225, *supra*, at 46, that statement should not be construed to require identification at sentencing of the exact day on which the prisoner will be released. As the Senate Report makes clear, what Congress sought to achieve was not certainty as to the release date as such—which corresponds only to the portion of the prison term the offender has left to serve—but certainty as to the total length of the period the defendant would spend in prison. The "grave defect of [preexisting] law" was that "no one is ever certain how much time a particular offender will serve" for the offense for which he was being sentenced. S. Rep. No. 225, *supra*, at 49. To remedy that defect, Congress designed a system in which, with the exception of good time credits earned in prison, the "sentence imposed by a judge * * * will represent the actual period of time that the defendant will spend in prison." *Id.* at 115; see also *id.* at 56.

Calculating the credit due at sentencing in order to fix a precise "release date" does violence to the terms of 18 U.S.C. 3585 and undermines the goal of eliminating sentencing disparities for similar offenders. The purpose of the sentencing credit provision,

like the Sentencing Reform Act as a whole, is to ensure that the length of the sentence the court imposes equals the amount of time the offender spends behind bars. As we note in our opening brief, not every prisoner begins to serve his federal sentence immediately after it is imposed. Prisoners such as respondent, who are borrowed from state custody for prosecution and sentencing, may begin to serve their federal sentence days, weeks, or even years after it is imposed, and may be eligible to receive credit for intervening periods of custody. See Gov't Br. 3-4 & n.2; see also, *e.g.*, *Causey* v. *Civiletti*, 621 F.2d 691, 693-694 (5th Cir. 1980) (offender returned to state custody following federal sentencing to stand trial on state charges); *Bloomgren* v. *Belaski*, 948 F.2d 688 (10th Cir. 1991) (defendant arrested by state authorities while free on federal appeal bond).

Section 3585 is designed to prevent an offender who begins to serve his federal sentence following an intervening period of detention from being confined for a longer period than an offender who begins to serve his federal sentence immediately. If the sentencing court has the responsibility for calculating sentencing credit under the statute, however, the total period that a defendant spends in incarceration will depend on the timing of his sentencing, not on the length of the sentence he receives.[1]

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[1] Respondent maintains (Br. 9) that the sentencing court must determine "the availability of prior jail time credits" because the time the defendant has already served on his sentence "inevitably [will] inform[]" the court's choice of a sentence within the sentencing range under the Sentencing Guidelines, or its decision to depart from the Guidelines range. Respondent's suggestion that the time a defendant has already spent in custody—or, alternatively, the portion of the

That Congress could not have intended this result is apparent from the plain terms of Section 3585, which states that periods of detention up to the time an offender commences to serve his sentence—not just up to the time of sentencing—shall "count" toward the sentence. That aspect of the statute cannot be squared with the sentencing court's exercise of the exclusive authority to award sentencing credit. Contrary to respondent's suggestion (Br. 15), sentencing credit is thus quite similar to good time credit, in that it is "not subject to determination at the time of imposition of sentence." Congress recognized this fact in the structure and wording of Section 3585. See Gov't Br. 12-13. Congress also required that events both before and after sentencing be taken into account in the credit calculation by explicitly banning the awarding of double credit for the same period of detention. As we explained in our opening brief, at 13-17, the double credit ban is unworkable if the calculation of sentencing credit is not timed to reflect post-sentence events. Unlike BOP, the sentencing court cannot make routine post-sentence adjustments in the calculation of sentencing credit.[2]

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sentence that remains to be served—is a proper or unavoidable consideration in fixing the total length of sentence is contrary to the spirit and terms of Section 3585. In mandating the award of full credit against the total length of sentence for eligible periods of detention, Congress decided that such periods, whether served before sentencing or after, were to be regarded as equivalent for the purpose of satisfying the sentence. Increasing the length of the sentence to discount time previously served would undermine Congress's evident intention to give full credit for eligible periods of incarceration that predate sentencing.

[2] Respondent contends that BOP's authority to adjust sentencing credit in response to an award of credit against a state

Respondent suggests (Br. 18 n.3) that a sentencing court can take post-sentence periods of detention into account by stating, in its judgment and commitment order, that, in addition to receiving a precise amount of credit for presentence detention, the offender "will also receive credit for the days between imposition of sentence and arrival at the prison." Upon the offender's arrival at prison, respondent argues, the administrator has "only to add these two figures to the time in custody at the institution" to determine the release date. *Ibid.* Respondent's proposal rests on the unwarranted assumption that the sentencing court can predict whether the offender will be entitled to credit for the entire period between sentencing and the commencement of his sentence. That determination depends on many factors, including whether the offender is in custody during the entire period, whether the custody in question counts as "official detention" eligible for credit, and whether the time is credited to another sentence. Those circumstances, by definition, cannot be known at the time of sentencing, but must be determined by the administrator charged with carrying out the court's order. Thus, respondent's pro-

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sentence that is imposed after federal sentencing undermines the State's authority to "choose whether to order its sentence concurrent or consecutive, vary the length of the sentence within the limits of state sentencing laws and any plea agreement, and, if the defendant is in state custody, choose whether to release the defendant for the service of the federal sentence." Br. 23. BOP's decision to adjust credit on a federal sentence to take into account a redundant state award in no way trenches on the State's authority to sentence as it chooses and to award credit against a state sentence for a period of prior custody. Rather, it ensures that the same period of detention is not credited against more than one sentence in defiance of federal law.

posal effectively amounts to a delegation to BOP of responsibility for calculating post-sentence custody credit, with the courts retaining authority to calculate presentence custody credit. That is no different in practice from a system of concurrent authority over sentencing credit. Yet even respondent acknowledges (Br. 17 n.2) that Congress did not intend the courts and BOP to exercise "shared responsibility" in this area.[3]

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[3] Respondent cites (Br. 23) Fed. R. Crim. P. 35(a)(2) and (c) as providing a mechanism for correcting or adjusting jail credit after sentence is imposed. As we explained in our opening brief (at 27-29), Rule 35(a) and (b) would not permit the recalculation of sentencing credit in many cases in which Section 3585 would mandate correction of the credit award. Similarly, new subsection (c) of Rule 35, effective December 1, 1991, which permits the sentencing court to correct a sentence "imposed as a result of arithmetical, technical, or other clear error" within 7 days after sentencing, would enable the court to recalculate credit in only a small percentage of those cases in which an adjustment would be necessary.

Respondent also implies (Br. 23) that a court could alter a sentence to adjust for post-sentence events under 18 U.S.C. 3582(c), which authorizes the court, on motion of the Director of BOP, to reduce a term of imprisonment once it has been imposed "if it finds that extraordinary and compelling reasons warrant such a reduction." First of all, this section only provides for a reduction in sentence, which would not enable a court to correct for a redundant credit award. In any event, as the Senate Report and the provision itself make clear, the section was enacted to cover a "relatively small number" of "unusual cases" marked by "extraordinary and compelling circumstances," such as "severe illness" or a subsequent amendment of the Sentencing Guidelines "to provide a shorter term of imprisonment" for the same offense. S. Rep. No. 225, *supra*, at 55-56; see also Section 3582(c)(1) and (2). It is unlikely that Congress intended district courts to make routine use of that provision to modify sentencing credit awards without mentioning that purpose as well.

Respondent ultimately concedes, as he must, that some offenders will not receive the credit to which they are entitled because no procedure is available for the court to award credit after sentence is imposed. Br. 23-24. In effect, respondent concludes that achieving "uniformity and certainty" in federal sentencing requires sacrificing compliance with the plain terms of Section 3585. But that tradeoff is unnecessary if Section 3585 is construed to preserve BOP's traditional authority to calculate sentencing credit. Uniformity and consistency in sentencing is possible only if Section 3585 is applied according to its terms: only then will the length of the sentence imposed correspond to the period of imprisonment that the offender actually serves, regardless of the date the federal sentence begins. If BOP makes detention credit calculations, the length of the sentence can readily be conformed to the letter of Section 3585.

2. Respondent notes that, in explaining its decision to abolish the Parole Commission, Congress rejected the argument that the Commission was capable of imposing sentence with greater uniformity and consistency than the district courts. Respondent urges this Court (Br. 11-12, 16-17) to reject the government's argument that BOP can achieve greater uniformity and consistency than the courts in calculating sentencing credit.

Respondent draws a false comparison between the Parole Commission's role in sentencing and BOP's function in calculating sentencing credit. In deciding to abolish the Parole Commission, Congress recognized that the Commission performed essentially the same function as the sentencing court: determining the length of sentence. Like the sentencing court, the Parole Commission exercised "very broad discretion," *Mistretta*, 488 U.S. at 363, in deciding how long an

offender would remain in prison. Under guidelines adopted by the Parole Commission in 1973, the parole decision still remained a complicated inquiry that was "particularly judicial in nature." S. Rep. No. 225, *supra*, at 54; see also *Mistretta*, 488 U.S. at 363-367.

Congress found that the system of dual sentencing, in which the court and the Commission exercised considerable discretion over the ultimate length of sentence, resulted in unpredictable and inconsistent sentences for similarly situated offenders and in disparities between the sentence imposed and the term actually served. *Mistretta*, 488 U.S. at 365; S. Rep. No. 225, *supra*, at 54-55. To remedy those shortcomings, Congress proposed to eliminate the dual sentencing system and consolidate in the courts the authority to "determine[] the actual duration of imprisonment." *Mistretta*, 488 U.S. at 365; S. Rep. No. 225, *supra*, at 46; see *id.* at 52-56.

BOP's role in calculating sentencing credit, in contrast with the Parole Commission's role before sentencing reform, is not redundant of the court's sentencing function, nor has it historically contributed to disparities and uncertainties in sentencing. There is a fundamental difference between imposing sentence—which involves fixing the magnitude of a term of imprisonment—and deciding how much of that sentence an offender has left to serve. Moreover, the calculation of sentencing credit, unlike the core sentencing function that the Parole Commission previously performed, is not "particularly judicial in nature." S. Rep. No. 225, *supra*, at 54. It does not require the weighing of a complicated array of factors, but instead calls for finding particular facts and applying technical rules to those facts.

The comparison respondent seeks to draw between the Parole Commission and BOP is inapt for the additional reason that, in comparing the Parole Commission's performance with its assessment of the district court's ability to carry out the sentencing function, Congress assumed that the courts would be operating within the proposed guidelines system. In contrast, Congress has not explicitly provided for the creation of guidelines to govern the court's calculation of sentencing credit. Thus, the courts have no uniform rules for the administration of the sentencing credit provision. See Gov't Br. 24. BOP, on the other hand, has operated under nationwide guidelines that address the range of circumstances bearing on the calculation of sentencing credit. For this reason, BOP is far more likely to perform the task of awarding credit in a consistent and uniform manner than the district courts.[4]

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[4] Respondent suggests that the court can give "appropriate consideration" to BOP guidelines regarding jail credit. Br. 21. If respondent means to say that the credit award decision should be made in accordance with BOP guidelines, it makes little sense to have the courts, rather than BOP, apply those guidelines. Indeed, if BOP is held not to have any statutory responsibility for making credit determinations, it is not clear why it would be within BOP's authority to promulgate such guidelines any more than it would be within the authority, for example, of the Executive Office of United States Attorneys. Although BOP has published an abbreviated set of interim rules under Section 3585 to replace the comprehensive guidelines developed under the predecessor provision, 18 U.S.C. 3568 (1982), see Gov't Br. App. 15a-18a, and is in the process of developing a more elaborate set of rules, it has not yet issued permanent guidelines under Section 3585. BOP would have no reason to do so if it lacks authority over sentencing credit awards.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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